SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 214

THE UNITED STATES OF AMERICA,
PETITIONER,

vs.

CUMBERLAND PUBLIC SERVICE COMPANY,
a Corporation.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 46963

CUMBERLAND PUBLIC SERVICE COMPANY, a Corporation,
CLAIMANT,

VS.

UNITED STATES OF AMERICA,
DEFENDANT.

Petition—Filed April 5, 1946

To the Honorable the Chief Justice and Judges of the United States Court of Claims:

The above-named claimant by this, its petition, respectfully shows:

1. That at all times hereinafter mentioned, until completion of dissolution proceedings as herein stated, claimant was a domestic corporation, created under and existing by virtue of the laws of the State of Kentucky, having its principal office and place of business at Burkesville, Cumberland County, Kentucky. Claimant's formal corporate existence was terminated by voluntary dissolu-
2 tion proceedings commenced on August 13, 1940, pursuant to the provisions of Section 561, Carroll's Kentucky Statutes, then in full force and effect (now codified as Section 271.300 of the Kentucky Revised Statutes). Under the provisions of said law, claimant has continued to act as a corporation for the purpose of closing up its business, but for no other purpose. Claimant has closed its business and settled its affairs as speedily as possible, and nothing remains thereof except the disposition of the claim involved in this litigation. Delays in the disposition of the claim herein presented have been occasioned (a) by the leisurely course pursued by the Commissioner of Internal Revenue, and (b) by the absence of an important witness for claimant who has until recently been in military service outside the continental limits of the United States.

2. The claimant has a just claim for refund of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), being for income and declared value excess profits taxes, and of Two thousand six hundred and forty-three and 48/100 Dollars ($2,643.48), interest thereon paid by it to the Collector of Internal Revenue for the District of Ken-

tucky on the dates hereinafter mentioned, as income and declared value excess profits taxes, and interest thereon, for the calendar year 1940, which said sum was wrongfully assessed and collected by the Commissioner of Internal Revenue of the United States.

3. The provisions of the law under which such wrongful assessment and collection were made are contained in Section 22 of an Act of Congress approved May 28, 1938, and known as the Revenue Act of 1938, 52 Stat. 447.

3 4. The provisions of law under which claimant claims such refund are contained in Section 322 of the Revenue Act of 1938, 52 Stat. 447; Section 322 of an Act of Congress approved February 10, 1939, and known as the Internal Revenue Code, and Section 3226 of the Revised Statutes of the United States.

5. Pursuant to the provisions of Section 3173 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided, the claimant on or about March 7, 1941, and on official form No. 1120, made to the Commissioner of Internal Revenue its final return of income, and excess profits taxes for the said calendar year 1940 and reported thereon a net loss in income of Seven thousand six hundred and two and 49/100 Dollars ($7,602.49), and no tax liability thereon.

6. The Commissioner of Internal Revenue audited and revised the return of income and excess-profits taxes so filed by the claimant and determined and assessed on the November, 1943, supplemental list, taxes in the amount of Seventeen thousand fifty-four and 70/100 Dollars ($17,054.70).

7. The said assessment having been transferred to the Collector of Internal Revenue for the Kentucky District, the said Collector on November 24, 1943, made demand on the claimant for the said sum of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70). In anticipation of said demand the assessment was discharged by the payment of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70) tax on October 15, 1943, and Two thousand, six hundred and forty-three and 48/100 Dollars ($2,643.48) interest on December 16, 1943.

4 8. On information and belief, the claimant avers that the said sums so paid as orginal tax to the Collector of Internal Revenue for the District of Kentucky, were by the said officials turned over to and deposited in the Treasury of the United States as in the usual course of business of such officials.

9. Pursuant to the provisions of Section 3220 of the Revised Statutes of the United States, as amended, and pursuant to the provisions of other acts of Congress, and on July 26, 1944, the claimant duly filed with the said Collector of Internal Revenue of the District of Kentucky at Louisville, Kentucky, a claim for refund in the amount of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), or such greater amount as is legally refundable, purporting to represent the said tax paid in the amount of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), and Two thousand, six hundred and forty-three and 48/100 Dollars ($2,643.48) interest paid thereon, a copy of which said claim for refund is attached hereto and marked "Exhibit A" (on page 16 hereof). The basis of such claim is that the said tax and interest were illegally collected from the claimant by reason of errors of the Commissioner of Internal Revenue (a) in including in taxable net income as gains on a sale of assets the sum of Seventy-one thousand, two hundred and ninety-three and 12/100 Dollars ($71,293.12); (b) in disallowing a loss of Six thousand, two hundred and fourteen and 99/100 Dollars ($6,214.99), and (c) in disallowing a loss of One thousand, two hundred and ninety and 12/100 Dollars ($1,290.12), said losses resulting from sales to claimant's stockholders.

10. The Commissioner of Internal Revenue considered the said claim for refund so filed by claimant and by his letter dated August 18, 1945, advised the claimant that the said claim was rejected in full. (A copy of said rejection letter is attached hereto and marked "Exhibit B" on page 22 hereof.)

11. The said sums of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), representing tax, and of Two thousand, six hundred and forty-three and 48/100 Dollars ($2,643.48), interest thereon, so paid to the Collector of Internal Revenue, are wrongfully withheld from the claimant for the following listed reasons:

(a) The respondent erroneously included in income a gain of Seventy-one thousand, two hundred and ninety-three and 12/100 Dollars ($71,293.12) from an alleged sale of the electric transmission and distribution facilities of claimant.

(b) The respondent erroneously disallowed and denied to claimant a deduction for a loss of Six thousand, two hundred and fourteen and 99/100 Dollars ($6,214.99), incurred by claimant on a sale of assets to its stockolder, E. S. Mayes.

(c) The respondent erroneously disallowed and denied to claimant a deduction for a loss of One thousand, two hundred and ninety and 12/100 Dollars ($1,290.12) incurred by claimant on a sale of properties to its stockholder, W. L. McComas.

Said amounts so paid to the Collector are illegally withheld from the claimant.

12. The claimant made no sale of its transmission and distribution facilities and realized no gain from the transfer of same. During April, 1940, and prior thereto, the claimant was engaged in negotiations with the Tri-County Electric Membership Corporation of Lafayette, Tennessee, hereinafter called "Tri-County," for the sale of claimant's said facilities. On or about April 27, 1940, the claimant broke off said negotiations and rejected an offer of $86,000.00 as made by Tri-County to purchase.

13. On or about May 15, 1940, claimant's counsel renewed discussions with W. E. Herring, of the Rural Electrification Administration, in Washington, D. C., relative to the possibility of effecting a sale of said assets at a higher price. Said Rural Electrification Administration was interested in lending the necessary purchase money to Tri-County. During said discussion said Herring raised the offer of Tri-County to $104,000.00.

14. By a letter dated May 31, 1940, claimant's counsel advised the Rural Electrification Administration that the claimant would not accept said offer of $104,000.00, but that E. S. Mayes and L. S. McComas, individuals and stockholders of claimant, were willing to undertake to acquire and sell said properties for the sum of $104,000.00. (A copy of said letter is attached hereto as claimant's "Exhibit C," on page 23 hereof.)

15. Under date of June 10, 1940, said E. S. Mayes and W. L. McComas, as individuals, entered into a written agreement with Tri-County whereby, as vendors, they agreed to sell to Tri-County the electric transmission and distribution liens and facilities to be acquired from this claimant, and Tri-County agreed to pay vendors the sum of $104,000.00, said agreement being subject to approval by the Administrator of Rural Electrification Administration. (A copy of said agreement is attached hereto as claimant's "Exhibit D," on page 26 hereof.)

16. Under date of August 9, 1940, Zana M. Mayes, wife of E. S. Mayes, and Katharine T. Mayes, wife of Finley M. Mayes, entered into a contract with E. S. Mayes

by which they each transferred to E. S. Mayes fifty shares of stock on the books of claimant and appointed him their agent to assist in the liquidation of this corporation claimant. (A copy of said contract is attached hereto as claimant's "Exhibit E," on page 34 hereof.)

17. Under ~~date of~~ August —, 1940, D. Keith McComas, W. Leslie McComas, Jr., Jack D. McComas and Elizabeth O. McComas, children of W. L. McComas, entered into a contract with W. L. McComas by which they each transferred to W. L. McComas forty shares of stock on the books of claimant and appointed him their agent to assist in the liquidation of this corporation claimant. Though undated, said contract was executed and delivered prior to August 13, 1940, the date of the meeting of claimant's stockholders hereinafter mentioned. (A copy of said contract is attached hereto as claimant's "Exhibit F," on page 36 hereof.)

18. On August 13, 1940, ~~at~~ a special meeting of all the stockholders of claimant, a resolution was unanimously adopted that claimant be dissolved and that a distribution to its stockholders be made in cash or in kind of all its assets not required to pay all of its outstanding indebtedness. (A copy of the minutes of said meeting is attached hereto as claimant's "Exhibit G," on page 38 hereof.)

19. On the same day, August 13, 1940, at a meeting of the Board of Directors of claimant, said resolution of dissolution by said stockholders was considered and a resolution as quoted below was offered, and unanimously adopted:

"RESOLVED FIRST, that W. L. McComas and E. S. Mayes be and they are hereby constituted a committee for liquidation and said committee be and is hereby authorized and directed to take such action as shall be necessary or desirable for the purpose of realizing upon the assets of the corporation the payment of its debts and the distribution to the stockholders of the assets of the corporation which shall remain after provision for the payment of said debts shall have been made.

"RESOLVED FURTHER, that said liquidation committee be and they are hereby authorized and directed to set aside from the assets of the corporation a fund sufficient to pay all debts of said corporation.

"RESOLVED FURTHER, that W. L. McComas as President, and F. M. Mayes, as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the

date of such conveyance all of the electric transmission and distribution facilities of this corporation located in the counties of Cumberland, Metcalfe, and Monroe in the Commonwealth of Kentucky, together with all services and connecting lines, fixtures and equipment used in connection therewith, and together with all easements, rights of way, or other interests in lands used in connection with such transmission and distribution liens, and all other rights, licenses, franchises, privileges, or permits used in connection with said lines, and that said officers be and they are hereby authorized and directed to execute, acknowledge and deliver for and on behalf of this corporation such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

(A copy of the minutes of said meeting is attached hereto as claimant's "Exhibit H." on page 39 hereof.)

9 20. On or about September 5, 1940, a joint application before the Public Service Commission of Kentucky was filed by this claimant, W. L. McComas and E. S. Mayes, and Tri-County Electric Membership Corporation, setting forth that this claimant was taking steps to dissolve and to determine its corporate existence; that as part of its plan of liquidation its electric transmission and distribution system would be conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend; that W. L. McComas and E. S. Mayes desired to sell and Tri-County desired to purchase said properties; that claimant desired to cease operation of said properties upon conveyance; that W. L. McComas and E. S. Mayes desired to continue operation of said properties until delivery of deed and bill of sale to Tri-County, and then to cease operations; That Tri-County desired to begin operation of said properties immediately upon delivery to it of the deed from W. L. McComas and E. S. Mayes, and that until delivery of such deed W. L. McComas and E. S. Mayes be permitted to continue such operation under the trade name of Cumberland Public Service Company. (A copy of said application is attached hereto as claimant's "Exhibit I," on page 41 hereof.)

Permission to consummate and carry into effect the proposed dissolution, operation, sale and purchase was granted on September 27, 1940, by the Public Service Commission of Kentucky. (A copy of said order is attached hereto as claimant's "Exhibit J," on page 45 hereof.)

21. Prior to the 6th day of September, 1940, and pursuant to the resolution adopted by its stockholders on August 13, 1940, claimant caused a notice to be published once a week, for four consecutive weeks, in a newspaper printed and published in the county wherein its principal place of business was located, stating that claimant was dissolving and closing up its business. A memorandum of the dissolution duly signed by an officer of claimant was duly attested, was transmitted to the County Clerk of Cumberland County, Kentucky, said office being the place where claimant's Articles of Incorporation were recorded.

Likewise claimant sent to the Secretary of State of Kentucky a written notice, signed by an authorized officer, with a copy of the action of claimant authorizing dissolution and a copy of the newspaper notice as published, and the same were filed by the Secretary of State of Kentucky and the dissolution of claimant was noted on the records of his office. (A copy of the instrument so filed and a copy of the newspaper notice are attached hereto as claimant's "Exhibit K," on page 47 hereof.)

22. Under date of October 22, 1940, this claimant, by its deed executed by W. L. McComas, President, and attested by F. M. Mayes, Secretary, and pursuant to said resolution adopted by the Board of Directors on August 13, 1940, transferred to W. L. McComas and E. S. Mayes, sole stockholders, claimant's electric transmission and distribution facilities, as a liquidating dividend. (A copy of said deed is attached hereto as claimant's "Exhibit L," on page 48 hereof.)

23. Under date of October 24, 1940, W. L. McComas and Agnes O. McComas, his wife, and E. S. Mayes and Zana McElroy Mayes, his wife, transferred and conveyed said properties so received from claimant to Tri-County Electric Membership Corporation. (A copy of said deed is attached hereto as claimant's "Exhibit M," on page 54 hereof.)

24. The respondent erroneously treated said above described transaction (paragraphs 11(a) to 23, inclusive) as a sale by or on behalf of claimant, and computed and included in income a net gain of Seventy-one thousand, two hundred, ninety-three and 12/100 dollars ($71,293.12).

25. In addition to the properties conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend in the manner described in the foregoing paragraphs, claim-

ant owned certain other properties of small value which it was obliged to dispose of in the course of winding up its affairs. These consisted of one 1937 Ford truck, certain machinery and equipment, and two small lots or parcels of land lying respectively in the towns of Tompkinsville and Burkesville, Kentucky. Claimant made efforts in good faith to sell said properties to persons other than its stockholders but was unsuccessful in obtaining offers for any of the same at prices approaching what claimant considered to be the fair market values of the same at that time.

26. On or about November 12, 1940, E. S. Mayes, one of the two stockholders of claimant tendered to the liquidating committee his written offer to purchase the 1937 Ford truck and the other machinery and equipment for the sum of One thousand, nine hundred and fifty dollars ($1,950) in cash, conditioned upon the privilege of allowing such machinery and equipment to remain in the buildings wherein the same were situated upon the above mentioned lots of land in Burkesville and Tompkinsville, Kentucky, for a period of two years, free of any charge for rent or storage. Said offer of E. S. Mayes was in excess of any other offers obtained by Claimant and represented the fair market value of said property at that time. (A copy of the said written offer is attached hereto as claimant's "Exhibit N," on page 61 hereof.)

12 At a meeting of claimant's liquidating committee held on November 16, 1940, said liquidating committee accepted the above mentioned offer of E. S. Mayes and sold to said E. S. Mayes the said Ford truck and other machinery and equipment for the sum of One thousand, nine hundred and fifty dollars ($1,950) in cash. Under date of November 30, 1940, a bill of sale for said property was executed and delivered to E. S. Mayes, who paid the agreed cash consideration therefor. (A copy of the minutes of the said meeting of claimant's liquidating committee is attached hereto as claimant's "Exhibit O," on page 62 hereof; and a copy of said bill of sale is attached hereto as claimant's "Exhibit P," on page 67 hereof.)

The property sold by claimant to E. S. Mayes as above set forth then had a depreciated value on claimant's books of $8,164.99 and by virtue of the above described sale, claimant sustained a loss of $6,214.99. The respondent erroneously treated said transaction as a distribution in liquidation and rejected the claim of a loss on the part of claimant in connection therewith.

27. On or about November 12, 1940, W. L. McComas, one of the two stockholders of claimant, tendered to the liquidating committee his written offer to purchase the two lots or parcels of land, with improvements thereon, situated respectively in Tompkinsville and Burkesville, Kentucky, for the sum of One thousand, five hundred and fifty dollars ($1,550) in cash agreeing at the same time to permit the purchaser of the machinery and equipment to leave the same upon the premises for two years without charge for storage or rental. Said offer of W. L. McComas was in excess of any other offers obtained by claimant and represented the fair market value of said property at that
13 time. Claimant could not obtain any other offer at all coupled with the above mentioned provision for the free storage of the machinery and equipment, and but for such provision claimant could have obtained no offer whatever for the machinery and equipment itself except at purely junk values. (A copy of the written offer of W. L. McComas is attached hereto as claimant's "Exhibit Q," on page 70 hereof.)

At the above mentioned meeting of claimant's liquidating committee held on November 16, 1940 (as shown by claimant's "Exhibit O"), said liquidating committee accepted the above mentioned offer of W. L. McComas and sold to him the said lots or parcels of land, with improvements thereon, subject to the terms and conditions of the offer, for the sum of One thousand, five hundred and fifty dollars ($1,550) in cash. Under date of November 30, 1940, a deed for said property was executed and delivered to W. L. McComas who paid the agreed cash consideration therefor. (A copy of said deed is attached thereto as claimant's Exhibit R," on page 71 hereof.)

The property sold by claimant to W. L. McComas as above set forth then had a depreciated value on claimant's books of Two thousand, eight hundred, forty and 12/100 dollars ($2,840.12) and by virtue of the above described sale claimant sustained a loss of One thousand, two hundred ninety and 12/100 dollars ($1,290.12). The respondent erroneously treated said transaction as a distribution in liquidation and denied claimant's loss with respect thereto.

28. Claimant states that no action upon this claim other than herein stated has been had before Congress or any other of the departments of the Government; that claimant has at all times through its officers and agents borne true allegiance to the United States of America,

and has not in any way voluntarily aided or abetted, or given encouragement to rebellion against said Government; and that it is the sole owner of the claim hereinabove presented, never having sold or assigned the same, or any part thereof, or any interest therein, to any person; and that it is justly entitled to recover the amount claimed after allowing all just credits and offsets.

The claimant believes the facts as hereinbefore stated to be true.

Wherefore the claimant Cumberland Public Service Company, a corporation, prays judgment against the United States of America, upon the facts and law, for the sum of Seventeen thousand, fifty-four and 70/100 dollars ($17,054.70) together with interest thereon from October 15, 1943, until paid; and for the sum of Twenty-six hundred, forty-three and 48/100 dollars ($2,643.48) with interest thereon from December 16, 1943, until paid; for its costs and disbursements herein expended; and for all other proper and equitable relief to which it may now or hereafter appear entitled.

CUMBERLAND PUBLIC SERVICE COMPANY,
Claimant,
By CORNELIUS W. GRAFTON,
Attorney.

Duly sworn to by Cornelius W. Grafton.
Jurat omitted in printing. (All in italics.)

Exhibit "A" to Petition

Form 843
TREASURY DEPARTMENT
Internal Revenue Service
(Revised April 1940)

CLAIM

To be filed with the Collector where assessment was made or tax paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Kentucky, }
County of Jefferson. } ss.

Type or Print
Name of taxpayer or purchaser of stamps: Cumberland Public Service Co.
Business address: Washington Bldg., Louisville, Ky.
Residence: Formerly Burkesville, Ky.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) filed: Kentucky.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1940 to Dec. 31, 1940.
3. Character of assessment or tax: Income tax and declared value excess-profits tax.
4. Amount of assessment, $17,054.70; dates of payment Oct. 15, 1943, Interest $2,643.48.
5. Date stamps were purchased from the Government:
6. Amount to be refunded (plus interest of $2,643.48): $19,698.18.
7. Amount to be abated (not applicable to income or estate taxes): $
8. The time within which this claim may be legally filed expires, under Section 322 (b) (1) of the Revenue Code on Oct. 15, 1945.

The deponent verily believes that this claim should be allowed for the following reasons:

Per statement hereto attached.

CUMBERLAND PUBLIC SERVICE CO.
Signed W. L. McCOMAS

E. S. MAYES
Liquidating Committee.

W. L. McComas sworn by Mildred Derr 6/23/44.
E. S. Mayes sworn by Julia Wharton 6/27/44

17 STATEMENT (FORM 843).

The entire tax of $17,054.70, refund of which is claimed herein, was based upon three errors of the Commissioner in adjusting the taxable income as reported by Cumberland Public Service Company in its income tax return for the year 1940, namely:

1. Adding to income a gain of $71,293.12 from an alleged sale of assets;

2. Disallowance of a loss of $6,214.99 incurred by the said corporation in a sale of certain of its assets to its stockholder, E. S. Mayes; and

3. Disallowance of a loss of $1,290.12 incurred by the corporation in a sale of certain other assets to its stockholder, W. L. McComas.

Statement of Facts.

The Cumberland Public Service Company (hereafter called Cumberland) was organized under the laws of Kentucky. It was engaged in the business of production and sale of electricity in certain Kentucky communities and districts. During April 1940, it was approached by representatives of the Tri-County Electric Membership Corporation (hereafter called Tri-County) of Lafayette, Tenn., with a view to purchase by Tri-County of the transmission and distribution systems of Cumberland. After some negotiations, during which Tri-County had refused to purchase the stock of Cumberland because counsel for Tri-County announced that the Rural Electrification Administration from which Tri-County had to borrow the purchase money would not permit purchase of stock, the officers and stockholders of Cumberland refused an offer of $86,000.00 for its properties, not only because the offer was not sufficient in amount, but because the Federal tax on a sale by Cumberland would be prohibitive.

Subsequently, about May 15, 1940, counsel for Cumberland was in New York City and engaged in further
18 conversations with counsel for Tri-County and advised that Cumberland would not be interested in making a sale, but that Messrs. W. L. McComas and E. S. Mayes, two stockholders, were planning to dissolve Cumberland, and, after dissolution they would be willing to sell the properties desired for $104,000.00.

Under date of June 10, 1940, W. L. McComas and E. S. Mayes on the one part, and Tri-County on the other part, entered into an agreement wherein McComas and Mayes expected to acquire, and would upon acquisition, sell to Tri-County, the transmission and distribution systems of Cumberland for a consideration of $104,000.00. The date of closing the sale was Sept. 1, 1940, or such other date as might be agreed upon.

On August 13, 1940, the stockholders of Cumberland adopted a resolution to dissolve the corporation and distribute its assets to the stockholders, and authorized the Board of Directors to take such action as might be necessary to effect dissolution. It was further resolved that W. L. McComas and E. S. Mayes be appointed a committee for liquidation to pay the debts of the corporation and distribute to stockholders assets remaining after payment of debts.

At a meeting of the Board of Directors on the same day, it was

> "Resolved Further, that W. L. McComas, as president, and F. M. Mayes, as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the date of such conveyance all of the electric transmission and distribution facilities of this corporation * * *, and that said officers be and they are hereby authorized and directed to execute, acknowledge and deliver for and on behalf of this corporation, such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

19 Pursuant to and under the authority of said resolutions, on August 13, 1940, of the stockholders and Board of Directors, the corporation, Cumberland Public Service Company, under date of Oct. 22, 1940, by its President, W. L. McComas, and attested by F. M. Mayes, Secretary, with the corporate seal affixed, "in consideration of the promises and in part satisfaction of the obligation of the Grantor to distribute its assets to the Grantees," transferred and conveyed to W. L. McComas and E. S. Mayes its electric transmission and distribution systems, etc.

Under date of Oct. 24, 1940, W. L. McComas and his wife and E. S. Mayes and his wife sold and conveyed said same properties thus acquired to Tri-County. In income tax returns the sale price and gain thereon were reported in pro rata portions by the several individuals, according to their respective beneficial ownership interests in the properties thus received in liquidation. The Commissioner treated the transaction as a sale by or on behalf of Cumberland and computed gain as first above stated. This action was erroneous and wrongful and contrary to the facts and the law.

2. Disallowance of a loss of $6,214.99 on a sale of assets by Cumberland to E. S. Mayes.

3. Disallowance of a loss of $1,290.12 on a sale of assets by Cumberland to W. L. McComas.

These two may be discussed in common.

After the distribution in liquidation of the transmission and distribution systems and the payment of debts, some divers and sundry assets remained for which there was no market. On Nov. 16, 1940, the Liquidating Committee (composed of W. L. McComas and E. S. Mayes) met to consider written offers for portions of said assets.

W. L. McComas made an offer of $1,550.00 for a lot or parcel of ground in Burkesville and one in Thompkinsville. E. S. Mayes submitted an offer of $1,950.00 for some old and obsolete machinery. Both offers were accepted by the Committee. The loss to the corporation on the lots was $1,290.12, and that on the machinery was $6,214.99.

20 A deed to the lots and a bill of sale for the machinery were executed and delivered by the Liquidation Committee.

The Commissioner denied deductions of both losses. The deficiency notice stated—"It is held that you are not entitled to deduct"—the losses. The revenue agent's report, in discussing the said sale—"However, in substance, it was the same as a liquidation distribution in kind, and it has been so treated in this report." Both transactions were bona-fide sales for valid considerations and the losses resulting were and are deductible.

Final dissolution on Nov. 30, 1940.

The total tax, $17,054.70, arising from the three above-recited adjustments, was paid on Oct. 15, 1943, and interest in the sum of $2,643.48 was paid on Dec. 16, 1943. These sums were paid by checks of the Cumberland Public Service Company, it having been reimbursed by contributions from the respective stockholders in proportion to their beneficial ownership interests. An original assessment was made against the corporation and transferee assessments were made against each of the stockholders.

Those contributing and their respective amounts of income tax and interest, and the excess-profits tax and interest, and totals are listed below:

Taxpayer	Income Tax	Interest	Declared Value Excess Profits Tax	Interest	Total
E. S. Mayes	$ 2,124.60	$ 329.31	$ 7.25	$ 1.12	$ 2,462.28
Zana M. Mayes	2,124.59	329.31	7.24	1.13	2,462.27
F. M. Mayes	2,124.60	329.31	7.24	1.12	2,462.27
Katherine T. Mayes	2,124.59	329.31	7.24	1.13	2,462.27
W. L. McComas	1,699.68	263.45	5.79	.90	1,969.82
D. Keith McComas	1,699.67	263.45	5.80	.90	1,969.82
W. Leslie McComas	1,699.68	263.45	5.79	.90	1,969.82
Jack D. McComas	1,699.67	263.45	5.79	.90	1,969.81
Elizabeth O. McComas	1,699.68	263.45	5.80	.89	1,969.82
Cumberland Public Service Company	$16,996.76	$ 2,634.49	$ 57.94	$ 8.99	$19,698.18

21 Separate claims for refunds of income taxes and of excess-profits taxes are concurrently filed for each and every contributor as transferee, and for the corporation. These claims should be considered together.

The claims, as between the transferor and the transferees, are in the alternative, and should a total refund of $19,698.18 and interest be granted, adjudicated or paid on any claim or claims, all other claims are to be considered cancelled and held for nought.

22 *Exhibit "B" to Petition.*

TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to
IT:CI:CC:Rej

Aug. 18, 1945

Cumberland Public Service Company
Washington Building
Louisville, Kentucky

In re: Claim for refund of $19,698.18
For the year 1940

Gentlemen:

Reference is made to revenue agent's report dated March 7, 1945 with respect to your tax liability. A copy of the

report was forwarded to you, and you were informed that the claim or claims for refund indicated above would be disallowed.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

(Signed) NORMAN D. CANN,
Deputy Commissioner.

23 *Exhibit "C" to Petition*

May 31, 1940.

Mr. W. E. Herring,
Rural Electrification Administration,
Washington, D. C.

Re: Tennessee 9 Macon.

Dear Mr. Herring:

Since my conversation with you on May 15, 1940, I have consulted with Messrs. McComas and Mayes and have in their behalf now completed a survey of the problems which would be involved in a sale to you. After considering the net result to the corporation, the directors of Cumberland Public Service Company have determined that the corporation will not accept an offer of $104,000.00 for the transmission and distribution lines.

Mr. McComas and Mr. Mayes individually, however, are willing to enter into a contract with the cooperative in such form as will be acceptable to your administration under the following terms and conditions.

(1) Messrs. McComas and Mayes as individuals will acquire the transmission and distribution lines of Cumberland Public Service Company and will agree to deed the same to the cooperative for a consideration of $104,000.00, such delivery and such payment to be made as soon as practicable after September 1, 1940, and in any event within thirty days thereafter.

(2) The cooperative will immediately and in any event, on or before June 10, 1940, without expense to my clients, procure whatever permission is necessary and make whatever connections are necessary to furnish to Cumberland Public Service Company or to Messrs. McComas and Mayes, if they are then the owners of the transmission and dis-

tribution lines, such power at standard TVA rates as they may need to supply that system.

(3) From and after the acceptance of this proposal, if accepted, Messrs. McComas and Mayes will cause the same service to be made available to the customers of Cumberland Public Service Company and at the same rates until the date of the delivery of the deed as set out in paragraph (1) so that you will be assured of a going concern being conveyed to you. During this period the cooperative is to have the right to either (a) make any additions or extensions or improvements on the transmission and distribution lines at the expense of such cooperative or (b) upon the specific order and direction of the cooperative, Messrs. McComas and Mayes will cause such extensions, improvements and additions to be made and the actual cost thereof will be added to the purchase price.

(4) On or before the date of the delivery of the deed, Messrs. McComas and Mayes will pay or cause to be paid all state, county, city, school district or other ad valorem taxes on said transmission and distribution lines then payable, but subject to such ad valorem taxes as may be by law then a lien against the property but not yet due and payable.

The reason for postponing delivery of the deed to September 1st or thereafter is because that I have now ascertained that the mortgage securing the outstanding bonds of the company provides that the bonds are callable on interest payment dates only and the next interest payment date is September 1st. As I told you in Washington a substantial part of the bonds are held by friends of Messrs. McComas and Mayes but some of the bonds are otherwise held and we find that we can not count on being able to get them in and so release the mortgage prior to September 1st.

As I explained to you in Washington, the power situation is an acute problem and while it is entirely agreeable to my clients to enter into an agreement looking to a delivery of the property in the future they can only do so in the event they are assured there will be no breakdown in the meantime. You advised me that you thought you could get from TVA permission for temporarily supplying such current where there was an actual contract under which the cooperative was to require the property and I assume that you have not found TVA's attitude to the contrary.

The foregoing conditions have been discussed informally by Mr. McComas with Mr. Sullivan in an attempt to find

some way in which to make the deal. It will probably take not less than two or three months in any event to complete the corporate transactions necessary to the delivery of the property in such form as is desired by your legal staff and Mr. Sullivan expressed the view that it was to the advantage of the cooperative to have some two or three months in which to get the improvements made before actually taking over the property as he anticipated a rush of new customers at that time.

I am sending copies of this letter to Mr. McComas who will doubtless furnish one to Mr. Sullivan or to Mr. Parker. As soon as you have consulted with these gentlemen and can advise me whether our suggestions are practical, I will be delighted to have my clients meet you at such time and place as is convenient for a more formal agreement to work it out.

Yours very truly,

(Signed) ARTHUR W. GRAFTON.

AWG/as
CC—Mr. McComas.

26 *Exhibit "D" to Petition*

AGREEMENT, made as of June 10, 1940, between W. L. McComas of Louisville, Kentucky, and E. S. Mayes of Springfield, Kentucky (said McComas and said Mayes being hereinafter collectively called the "Vendors"), and Tri-County Electric Membership Corporation (hereinafter called "Tri-County"), a cooperative corporation organized and existing under the laws of the State of Tennessee.

WITNESSETH:

WHEREAS, Cumberland Public Service Company (hereinafter called "Cumberland") has acquired and is now operating an electric system in the State of Kentucky, including, without limitation, certain electric transmission and distribution lines and facilities in Cumberland, Metcalfe, and Monroe Counties in the Commonwealth of Kentucky; and

WHEREAS, Vendors expect to acquire all of such electric transmission and distribution liens and facilities of Cumberland and, in the event of such acquisition, desire to sell to Tri-County the electric transmission and distribution lines and facilities so acquired immediately upon such acquisition, and Tri-County is willing to purchase such electric transmission and distribution lines and facilities upon the terms and conditions herein set forth;

NOW, THEREFORE, for and in consideration of the mutual agreements herein contained, the parties hereto covenant, promise and agree as follows:

Section 1. Vendors shall grant, bargain, sell, alien, enfeoff, remise, release, convey, confirm, transfer and deliver to Tri-County the property more particularly described in the Deed and Bill of Sale, marked "Exhibit A," attached hereto and by this reference made a part hereof, with such additions and betterments as may be made to the existing system of Cumberland between the date
27 of this contract and the Closing Date hereinafter provided for, all with convenants of warranty as set forth in such Exhibit A, free and clear of all liens and encumbrances of every kind and nature whatsoever, except ad valorem taxes which are to be prorated and provided for as set forth in section 5 hereof. Such properties shall be conveyed as a going electric system with the exclusive right as between the parties hereto and parties in privity with them to serve the consumers being served through such properties at the time of such conveyance. The Deed and Bill of Sale shall be executed and delivered in a sufficient number of counterparts to permit Tri-County to record such instruments simultaneously in the three counties in which the property to be acquired is located.

Section 2. In consideration of such sales, conveyance and delivery, Tri-County shall pay to Vendors on the Closing Date the sum of One Hundred Four Thousand Dollars ($104,000).

Section 3. Vendors will pay to Tri-County on the Closing Date an amount equal to the amounts of customer meter deposits and customer refundable contributions for extensions including accrued interest, if any, on such deposits and contributions held on the Closing Date in respect of the properties conveyed, and Tri-County shall assume the obligations of Cumberland and/or Vendors for the repayment of such deposits and contributions to the extent and only to the extent of such payment by Vendors.

Section 4. The closing shall take place at the offices of Bank of Cumberland, in Burkesville, Kentucky, or at such other places as Tri-County and Vendors may agree upon in writing, and the date of such closing (herein in this agreement called the "Closing Date") shall be September 1, 1940 or such other date (in any event not later than October 1, 1940) as may be similarly agreed upon in writing. Time is of the essence of this agreement. The payments

required by sections 2, 3, 5 and 7 hereof to be made
28 on the Closing Date shall be made simultaneously.

Section 5. The parties hereto agree to prorate as of the Closing Date all state, County, municipal and other ad valorem taxes on tangible property to be conveyed as herein provided, based upon the annual report required to be filed by law with the Auditor of Public Accounts of Kentucky between December 31, 1939 and March 31, 1940. Vendors shall bear 1/366 of such taxes for each day of the year 1940 up to and including the Closing Date. To the extent, if any, to which the tax rates and assessments are determined or determinable by the Closing Date, Vendors shall pay to Tri-County Vendors' pro rata share of the taxes so determined or determinable. In respect of taxes not so determined or determinable, Vendors agree to deposit on the Closing Date under an escrow agreement satisfactory to Tri-County, cash or collateral satisfactory to Tri-County in an amount sufficient to pay to Tri-County Vendors' pro rata share of such taxes as soon as determined exactly.

Section 6. Vendors agree that between the date hereof and the Closing Date no contract which must be assumed by Tri-County on the Closing Date in connection with the operation of the electric properties to be conveyed hereunder shall be entered into by Vendors or by any other person, firm or corporation other than such contracts as are incidental to the normal operation of the business to be conveyed hereunder. There shall be no general assumption by Tri-County of liabilities, *ex contractu* or *ex delicto*, but Tri-County agrees to assume as of the Closing Date, or save the Vendors unharmed from, all obligations arising subsequent under all contracts for the sale of power to the ultimate consumer (except any contracts involving the rental of generating plants, or other matters not a part of normal power sale contracts), provided that the rates specified in such contracts are the regularly published rates now charged by Cumberland and on file with the appropriate regulatory commission.

29 Section 7. From and after the effective date hereof to the Closing Date none of the property to be conveyed shall be retired from Service and no sale or other disposition of any of the property to be conveyed hereunder shall be made, permitted or suffered except of such property as may be or become worn out, unserviceable or obsolete and retired from service in the usual course of business on that account. Upon retirement from ser-

vice of such worn out, unserviceable or obsolete property, Vendors shall forthwith make, or cause to be made, adequate replacement thereof. Vendors shall operate and maintain the properties to be conveyed hereunder in accordance with good utility practice, or cause such properties to be so operated and maintained, and any additions, replacements, improvements or extensions provided for herein shall be so made. In the event that any replacements are made in respect of the transformers now located in Cumberland's substation at Tompkinsville, Kentucky, such replacements shall consist of three 75 KVA stepdown transformers, the voltage specifications of which shall be subject to the approval of Tri-County. All operations of the electric system to be conveyed hereunder shall be at Vendors' risk until the Closing Date, and in the event of any loss or damage to any of said property prior to the Closing Date from any cause whatsoever other than the wrongful act of Tri-County, Vendors shall make, or cause to be made, adequate replacement of such property or the sale price shall be reduced in the amount of such loss or damage. Tri-County shall pay to the Vendors on the Closing Date the actual cost of capital additions to the properties to be conveyed hereunder made between the date hereof and the Closing Date. The parties hereto agree that such obligation of Tri-County in so far as it applies to such capital additions made between June 10, 1940 and July 15, 1940 to the properties proposed to be conveyed shall, in any event, not exceed four hundred dollars ($400). Vendors shall pay to Tri-County on the Closing Date an amount equal to the book cost of all property to be conveyed hereunder which is retired from service between the date hereof and the Closing Date whether or not such property has been removed upon retirement, provided, however, that the three 25 KVA transformers now located at Cumberland's substation at Tompkinsville, Kentucky, shall be included in the conveyance by Vendors to Tri-County and the provision of this section 7 with respect to retirements of property and payments by Vendors to Tri-County on the Closing Date shall not apply in respect of the retirement of such transformers. Vendors agree that from the date hereof no capital additions will be made to the properties which Tri-County is obligated to purchase hereunder without the written approval of Tri-County, which consent, in respect of capital additions to be made in the usual course of business, shall not be unreasonably withheld.

Section 8. Tri-County shall, upon the execution of this agreement, forthwith construct such extensions to its present electric system as to enable power to be supplied at wholesale by Tennessee Valley Authority to Cumberland or to Vendors, as the case may be, at the 11/2.3 KV substation located at Tompkinsville, Kentucky, pursuant to a certain agreement, dated July , 1940, between Tennessee Valley Authority and Cumberland. Such power shall be supplied by Tennessee Valley Authority at 13 KV and shall be limited in amount to a maximum demand of 300 KW. In the event that the properties which the Vendors herein agree to convey on the Closing Date be not conveyed on said date, then the Vendors jointly and severally agree to purchase at the election of Tri-County within thirty (30) days thereafter such of the extensions so constructed as Tri-County may designate and pay Tri-County therefor the total cost to Tri-County of the construction and equipment of the facilities so purchased.

Section 9. Electric service rendered by Cumberland and/or Vendors and remaining unbilled upon the Closing Date shall be billed by Tri-County to the respective consumers thereof at Cumberland's rates and the amount thereof collected by Tri-County shall be prorated as of the Closing Date; for example, where meters are read ten (10) days after the Closing Date and the billing and service period is thirty (30) days, the billing shall be prorated ten-thirtieths (10/30ths) to Tri-County and twenty-thirtieths (20/30ths) to Vendors. Tri-County shall pay to Vendors, as soon as practicable after the Closing Date, that portion of the revenues derived from said consumers to which Vendors shall be entitled pursuant to this provision. Tri-County shall assist Vendors in the collection of bills for services to consumers billed prior to the Closing Date and remaining unpaid on such Closing Date.

31

Section 10. Vendors shall execute and deliver to Tri-County all such conveyances, bills of sale, assignments, opinions and other instruments in form and substance satisfactory to Tri-County as shall be reasonably requested by Tri-County and, at the request of Tri-County, shall take all such further action as may be necessary to effectuate the intention of this agreement. On the Closing Date Vendors shall deliver to Tri-County an opinion or opinions of counsel in form and substance satisfactory to Tri-County.

Section 11. All notices hereunder to Vendors shall be sufficient if sent by registered mail or telegram addressed

to W. L. McComas, at Louisville, Kentucky, or E. S. Mayes, at Springfield, Kentucky. All notices hereunder to Tri-County shall be sufficient if sent by registered mail or telegram to Tri-County Electric Membership Corporation at Lafayette, Tennessee, provided, however, that true and correct copies thereof are simultaneously sent by the same method to Rural Electrification Administration, Washington, D. C. Either of the parties hereto by notice in writing to the other party hereto may specify another and different address for purposes of notifications, and in such cases notices shall be sufficient if sent by registered mail or telegram addressed as specified in such subsequent notification. All notices shall be deemed to have been
32 given on the date of posting if sent by mail, or of delivery to the sending office of the telegraph office if sent by telegram.

Section 12. The Vendors shall obtain, or cause to be obtained, authorizations, permits and approvals to the extent required by law, from all state, federal and local authorities having jurisdiction in the premises in connection with any of the acts or transactions provided for in this agreement, including, though not by way of limitation, the Kentucky Public Service Commission. Tri-County shall render to Vendors such assistance in connection with the obtaining of such consents, approvals and authorizations as Vendors may reasonably request.

Section 13. This agreement and any ancillary agreements entered into pursuant hereto shall bind and inure to the benefit of the successors and assigns of the respective parties hereto.

Section 14. Tri-County may, upon notice to Vendors, assign all or any part of its rights under this agreement to another person, firm or corporation and agree to make such assignment if and to the extent requested by the Administrator of the Rural Electrification Administration. In the event of the receipt of notice of such assignment or assignments Vendors agree to make the conveyances, payments and assignments provided for in this agreement as directed in such notice of assignment. Any such assignee of all or any part of the rights of Tri-County pursuant to this agreement shall, by virtue of the acceptance of such assignment, agree to assume all of the duties and liabilities of Tri-County under this agreement in so far as such duties and liabilities relate to the properties or rights included within the scope of such assignment.

Section 15. This agreement may be simultaneously executed and delivered in two or more counterparts, each of which so executed and delivered shall be deemed to be an original, and all shall constitute but one and the same instrument.

33 Section 16. The effectiveness of this agreement shall be conditioned upon approval thereof by the Administrator of Rural Electrification Administration.

IN WITNESS WHEREOF Tri-County has caused this agreement to be signed in its corporate name and its corporate seal to be hereunto affixed and attested by its proper officers thereunto duly authorized, and Vendors have hereunto affixed their hands and seals, all as of the day and year first above written.

TRI-COUNTY ELECTRIC MEMBERSHIP CORPORATION

(Seal) by *President*

Attest:

Secretary

(Signed) W. L. McCOMAS (Seal)
W. L. McComas

(Signed) E. S. MAYES (Seal)
E. S. Mayes

34 *Exhibit "E" to Petition*

CONTRACT AND AGREEMENT

THIS CONTRACT AND AGREEMENT made this 9th day of August, 1940 by and between Zana M. Mayes, wife of E. S. Mayes, and Katharine T. Mayes, wife of Finley M. Mayes (parties of the first part) and E. S. Mayes (party of the second part),

WITNESSETH:

THAT WHEREAS, each of the parties to this agreement is the owner of fifty (50) shares of the capital stock of Cumberland Public Service Company, a Kentucky corporation of Burkesville, Kentucky, and all of the parties desire that said corporation be dissolved and its assets distributed to stockholders after the payment of the debts of the corporation, and in order to facilitate such action first parties have transferred their shares of stock on the books of the company to second party pursuant to this agreement, the first parties desire that second party shall act for them and as their agent to assist in the liquidation of the corporation and obtain and distribute to first parties their respective shares of the assets of said corporation or the value thereof,

NOW THEREFORE, in consideration of the premises and for the sum of One Dollar ($1.00) cash in hand paid by each of the first parties to second party, receipt of which is hereby acknowledged, the undersigned party of the second part hereby agrees that he will act as agent for each of first parties and will receive from time to time for and on behalf of each of first parties as trustee and agent for first parties all assets of Cumberland Public Service Company properly distributable to first parties, whether in money or in kind, and upon the completion of the liquidation of the assets of said corporation, party of the second part will make a true accounting to each of first parties with respect to the money and/or assets so received.

35 WITNESS the signatures of the parties this....day of August, 1940.

(Signed) ZANA M. MAYES.
(Signed) KATHERINE T. MAYES,
Parties of the First Part.

Witnesses:
Louise McElroy
W. L. McComas

E. S. MAYES,
Party of the Second Part.

36 *Exhibit "F" to Petition*

CONTRACT AND AGREEMENT

THIS CONTRACT AND AGREEMENT made this—day of August, 1940 between D. Keith McComas, W. Leslie McComas, Jr., Jack D. McComas, and Elizabeth O. McComas (parties of the first part), and W. L. McComas, Sr. (party of the second part),

WITNESSETH:

THAT WHEREAS, each of the parties to this agreement is the owner of forty (40) shares of the capital stock of Cumberland Public Service Company, a Kentucky corporation of Burkesville, Kentucky, and all of the parties desire that said corporation be dissolved and its assets distributed to stockholders after the payment of the debts of the corporation, and in order to facilitate such action first parties have transferred their shares of stock on the books of the company to second party pursuant to this agreement, and first parties desire that second party shall act for them and as their agent to assist in the liquidation of the corporation and obtain and distribute to first parties

their respective shares of the assets of said corporation or the value thereof,

Now Therefore, in consideration of the premises and for the sum of One Dollar ($1.00) cash in hand paid by each of the first parties to second party, receipt of which is hereby acknowledged, the undersigned party of the second part hereby agrees that he will act as agent for each of the first parties and will receive from time to time for and on behalf of each of first parties as trustee and agent for first parties all assets of Cumberland Public Service Company properly distributable to first parties, whether in money or in kind, and upon the completion of the liquidation of the assets of said corporation, party of the second part will make a true accounting to each of first parties with respect to the money and or assets so received.

37 Witness the signatures of the parties this——day of August, 1940.

(Signed) D. Keith McComas
(Signed) W. Leslie McComas, Jr.
(Signed) Jack D. McComas
(Signed) Elizabeth O. McComas
Parties of the First Part

(Signed) W. L. McComas
Party of the Second Part

Witnesses:

38 *Exhibit "G" to Petition*

Special Meeting of Stockholders

At a special meeting of the stockholders of Cumberland Public Service Company held on the 13th day of August, 1940 at the Kentucky Home Life Building in Louisville, Kentucky pursuant to a written waiver of notice signed by all of the stockholders of Cumberland Public Service Company, and all of said stockholders being present, to-wit: W. L. McComas, E. S. Mayes, and Finley Mayes, the following resolution was offered:

"Whereas, it is considered that the best interests of the stockholders of this corporation will be served by an immediate dissolution of said corporation and a liquidation of its properties,

"Be It Resolved that this corporation be dissolved in accordance with the laws of the State of Kentucky

and the Board of Directors and the persons selected by them be and they are empowered, authorized, and directed to take all steps which shall be necessary or desirable to effect the dissolution of this corporation, the liquidation of its assets and liabilities, and the distribution to its stockholders in cash or in kind of all its assets which shall not be required to pay all of its outstanding indebtedness."

Upon a motion duly made and seconded the above resolution was adopted by the unanimous vote of all of the stockholders of the corporation.

(Signed) F. M. MAYES
Secretary

39 *Exhibit "H" to Petition*

SPECIAL MEETING OF BOARD OF DIRECTORS OF CUMBERLAND PUBLIC SERVICE COMPANY

At a meeting of the Board of Directors of Cumberland Public Service Company, held at the office of Grafton & Grafton, Kentucky Home Life Building, Louisville, Kentucky, on the 13th day of August, 1940 at two-thirty p. m., all of the directors of this corporation being present, there was produced before and examined by said meeting a resolution of the stockholders of this corporation authorizing a dissolution of said corporation and authorizing and directing the Board of Directors to take such action as might be necessary or desirable to effect the dissolution of the corporation, the payment of its debts, and the distribution of its remaining assets to the stockholders, and said resolution having been discussed at this meeting, the following resolution was offered:

"RESOLVED FIRST, that W. L. McComas and E. S. Mayes be and they are hereby constituted a committee for liquidation and said committee be and is hereby authorized and directed to take such action as shall be necessary or desirable for the purpose of realizing upon the assets of the corporation the payment of its debts and the distribution to the stockholders of the assets of the corporation which shall remain after provision for the payment of said debts shall have been made.

"RESOLVED FURTHER, that said liquidation committee be and they are hereby authorized and directed to set aside from the assets of the corporation a fund sufficient to pay all of the debts of said corporation.

"Resolved Further that W. L. McComas as President, and F. M. Mayes, as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the date of such conveyance all of the electric transmission and distribution facilities of this corporation located in the counties of Cumberland, Metcalfe, and Monroe in the Commonwealth of Kentucky, together with all services and connecting lines, fixtures and equipment used in connection therewith, and together with all easements, rights of way, or other interests in lands used in connection with such transmission and distribution lines, and all other rights, licenses, franchises, privileges, or permits used in connection with said lines, and that said officers be and they are hereby authorized and directed to execute, acknowledge, and deliver for and on behalf of this corporation such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

Upon motion duly made and seconded the foregoing resolution was unanimously adopted.

(Signed) F. M. Mayes
Secretary

Exhibit "I" to Petition

Before the Public Service Commission of Kentucky

In the Matter of the Joint Application of Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation for the Sale and Purchase of Utility Properties.	No. 848

Comes Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation and respectfully show as follows:

(1) Cumberland Public Service Company is engaged in the business at the present time of owning and operating various electric light and power properties in the State of Kentucky and more particularly in the Counties of Cumberland, Monroe, and Metcalfe, and in the sale of electric light and power to the inhabitants of such counties and the towns therein. The nature of such business and the ter-

ritorial extent thereof are more particularly shown in the annual reports of such Company heretofore filed with the Commission. The post office address of Cumberland Public Service Company is Burkesville, Kentucky.

(2) W. L. McComas and E. S. Mayes are the principal stockholders of Cumberland Public Service Company. The post office address of W. L. McComas is 405 Belgravia Court, Louisville, Kentucky, and of E. S. Mayes is Springfield, Kentucky.

(3) Tri-County Electric Membership Corporation is a cooperative corporation owning and operating electric light and power properties in Tennessee and Kentucky, with its principal office in LaFayette, Tennessee.

(4) Certified copies of the Articles of Incorporation of Cumberland Public Service Company have been heretofore filed with this Commission and a certified copy of
42 the Articles of Association of Tri-County Electric Membership Corporation has either been heretofore so filed or is filed simultaneously herewith.

(5) Cumberland Public Service Company has been and is now taking the steps required under Kentucky law to dissolve and to terminate its corporate existence, such dissolution to be accomplished within two years from the date hereof. As a part of its dissolution and its plan of liquidation, its electric transmission and distribution system in Cumberland, Monroe, and Metcalfe Counties, Kentucky, will be conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend. Such properties are more particularly described in the form of deed and bill of sale attached hereto.

(6) W. L. McComas and E. S. Mayes desire to sell to Tri-County Electric Membership Corporation and Tri-County Electric Membership Corporation desires to purchase from W. L. McComas and E. S. Mayes properties described in the form of deed and bill of sale heretofore mentioned for the consideration therein set out.

(7) Cumberland Public Service Company desires to cease operation of such properties upon the conveyance thereof to W. L. McComas and E. S. Mayes. W. L. McComas and E. S. Mayes desire to continue the operation of such properties until the delivery of the deed and bill of sale to Tri-County Electric Membership Corporation and to then cease such operations. Tri-County Electric Membership Corporation desires to begin the operation of the properties immediately upon the delivery to it of the deed from W. L. McComas and E. S. Mayes.

(8) It is contemplated that not over thirty (30) days will elapse from the delivery of the deed and bill of sale from Cumberland Public Service Company to W. L. McComas and E. S. Mayes until the delivery by W. L. McComas and E. S. Mayes of the deed to Tri-County Electric Membership Corporation, and that during such interim it is desired that W. L. McComas and E. S. Mayes be permitted to continue such operation under the trade
43 name of Cumberland Public Service Company in order to avoid confusion and unnecessary expense.

WHEREFORE, Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation pray that the Public Service Commission of the Commonwealth of Kentucky make its order authorizing the applicants to consummate and carry into effect the proposed dissolution, operation, sale and purchase of the utility properties as herein described.

Dated at Louisville, Kentucky, this —— day of August, 1940.

CUMBERLAND PUBLIC SERVICE COMPANY
By W. L. McCOMAS
President.

Arthur W. Grafton,
Counsel for Cumberland Public
Service Company.

W. L. McCOMAS,
E. S. MAYES.

Arthur W. Grafton,
Counsel for W. L. McComas and
E. S. Mayes.

TRI-COUNTY ELECTRIC MEMBERSHIP
CORPORATION,
By WILLIAM PARKER
President.
(Seal)

Harold Howser
Counsel for Tri-County Electric
Membership Corporation, Gallatin, Tennessee.

W. L. McComas, being first duly sworn states that he is President of Cumberland Public Service Company and one of the applicants in the proceeding above, that he has read the foregoing application, and that the facts therein stated are true to his own knowledge.

W. L. McCOMAS.

Subscribed and sworn to before me by W. L. McComas this 30th day of August, 1940. My commission expires the 19th day of December, 1943.

LILLIAN FLEISCHER
Notary Public, Jefferson County, Kentucky.

(Seal)

W. L. McComas and E. S. Mayes, being duly sworn, state that they are two of the applicants in this proceeding, that they have read the foregoing application, and that the facts therein stated are true to their own knowledge.

W. L. McCOMAS,
E. S. MAYES.

Subscribed and sworn to before me by W. L. McComas and E. S. Mayes, this 3d day of September, 1940. My Commission expires the 19th day of December, 1943.

LILLIAN FLEISCHER
Notary Public, Jefferson County, Kentucky.

(Seal)

William Packer, being first duly sworn states that he is President of Tri-County Electric Membership Corporation, one of the applicants in this proceeding, that he has read the foregoing application, and that the facts stated therein are true to his knowledge.

WILLIAM PACKER.

Subscribed and sworn to before me by William Packer this 31st day of Aug., 1940. My commission expires the 5th day of Jan., 1940.

L. C. PARKER,
Notary Public, Macon County, Tenn.

(Seal)

45 *Exhibit "J" to Petition*

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

A meeting of the Public Service Commission was held on this date; present: Commissioners Greenleaf, Kirtley, and McGregor.

In the Matter of the Joint Application of Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation for the Sale and Purchase of Utility Properties.	Case No. 848

ORDER

On September 5, 1940, the Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation filed with the Public Service Commission of Kentucky their properly verified application and petition by which the Cumberland Public Service Company seeks permission to dissolve, and in dissolution and liquidation, to transfer to W. L. McComas and E. S. Mayes certain properties described in said application and exhibit attached thereto; and W. L. McComas and E. S. Mayes seek authority to sell and Tri-County Electric Membership Corporation seeks authority to purchase such utility properties.

Notice of a hearing thereon having been given for this day at 11:00 a. m., there appeared for Cumberland Public Service Company, W. L. McComas, President, and Arthur W. Grafton, Attorney; W. L. McComas and E. S. Mayes in person and by Arthur W. Grafton, their Counsel; Tri-County Electric Membership Corporation by W. H. Sullivan, Manager, and Harold Howser, its Counsel. There also appeared Phillip H. Wilson, Counsel for Farm-
46 ers Rural Electric Cooperative Corporation, and E. V. Withers, Vice President of said Corporation, and H. E. Gardner, Superintendent.

Thereupon Farmers Rural Electric Cooperative Corporation by counsel made a formal protest to the transactions set forth in the application and petition but offered no proof or argument in connection therewith; and said protest having been duly considered, it is ordered and the same be and it is hereby overruled.

Thereupon the Commission having heard the statements of counsel and the testimony of witnesses as set forth in the record and being otherwise fully advised,

IT IS ORDERED, That the application of the Cumberland Public Service Company to dissolve and of W. L. McComas and E. S. Mayes to sell and Tri-County Electric Membership Corporation to purchase and acquire the utility properties set forth and described in said application and the exhibit annexed thereto be and it is hereby approved.

PROVIDED, HOWEVER, that the authority granted herein is granted on the following conditions:

(1) That the Tri-County Electric Membership Corporation by and through its Board of Directors shall specifically consent to the jurisdiction of this Commission, or its successor regulatory agency, over said Corporation to the same extent and in all respects as the Commission now has jurisdiction over public utilities generally in this State and that a certified copy of the resolution of the Board of Directors of said Corporation shall be filed with this Commission.

(2) That the transactions provided for herein shall be consummated without any interruption of, or impairment to, the service now being rendered to the customers of the Cumberland Public Service Company.

Done at Frankfort, Kentucky, this 27th of September, 1940.

PUBLIC SERVICE COMMISSION OF KENTUCKY
(Signed) CHAS. J. WHITE
(Seal) *Secretary.*

47 *Exhibit "K" to Petition*

Copy of Newspaper Notice Must Be Attached to This Statement

STATEMENT OF DISSOLUTION

To whom it may concern:

As provided by amendment to Section 561, Kentucky Statutes, as per H. B. No. 40, Acts 1932, the stockholders representing more than a majority of the stock of Cumberland Public Service Company, having consented, in writing,
(Name of Corporation and Address)
to close its business and wind up its affairs, be it now

RESOLVED, By the board of directors of said corporation that it shall now close its business as provided by said law and same is hereby declared to have been done.

THEREFORE, The Secretary of State of Kentucky is hereby authorized to cancel the charter and name of this corporation.

Done at Louisville, Ky., this 13th day of August, 1940, by vote of the directors of

CUMBERLAND PUBLIC SERVICE COMPANY
(Name of Corporation)
By W. L. McCOMAS
(President)

A Copy attest:
(Signed) S. A. SMITH
County Court Clerk, Cumberland County
By Edna Collins, D. C. C.

Form-Sec.-O-S Stodis—4

(The following is a copy of notice published in Burkesville, Kentucky, on August 15, 22 and 29 and September 5, 1940.)

NOTICE

Notice is hereby given that Cumberland Public Service Company, a Kentucky corporation, with its principal office in Burkesville, Cumberland County, Kentucky, is closing up its business and dissolving.

CUMBERLAND PUBLIC SERVICE COMPANY
W. L. McCOMAS, *President.*

48 *Exhibit "L" to Petition*

DEED AND BILL OF SALE

THIS DEED AND BILL OF SALE made this 22 day of October, 1940, by and between Cumberland Public Service Company, a corporation organized and existing under and by virtue of the laws of the State of Kentucky, with its principal office in Burkesville, Kentucky (hereinafter called "Grantor"), and W. L. McComas and E. S. Mayes (hereinafter called "Grantees");

WITNESSETH:

THAT WHEREAS, by a resolution duly adopted at a meeting of the stockholders of the Grantor called for that purpose, held on August 13, 1940, said stockholders authorized the dissolution of the Grantor and the distribution of its assets to its stockholders, and

WHEREAS, by a resolution duly adopted at a meeting of the Board of Directors of the Grantor called for that purpose,

held on August 13, 1940, said Board of Directors acting under the authority of the aforesaid resolution of the stockholders authorized the execution of this instrument by the Grantor for the purpose of conveying the hereinafter described property to the stockholders of record at the date of the making of this conveyance, and

WHEREAS, the Grantees are as of this date all of the stockholders of the Grantor, and

WHEREAS, all of the debts of the Grantor, except the unpaid balance of the indebtedness secured by the mortgage deed of trust to which this conveyance is subject, have been paid;

NOW, THEREFORE, in consideration of the premises and in part satisfaction of the obligation of the Grantor to distribute its assets to the Grantees, the Grantor has granted,
bargained, sold, aliened, enfeoffed, remised, released,
49 transferred, confirmed, conveyed and delivered and
do by these presents grant, bargain, sell, alien, enfeoff, remise, release, transfer, confirm, convey and deliver unto Grantees, their successors and assigns, all of the electric transmission and distribution lines and facilities of Grantor which as of June 10, 1940 were operated by Grantor, together with all improvements, betterments and extensions to such properties made between said date and the date hereof, including, though not by way of limitation, the following described property situated in the Counties of Cumberland, Metcalfe, and Monroe, in the Commonwealth of Kentucky, together with all the rights, privileges, appurtenances and facilities to said property in anywise appertaining or belonging, to-wit:

I.

The electric transmission and distribution lines and facilities of Grantor located in the Counties of Cumberland, Metcalfe, and Monroe, in the Commonwealth of Kentucky, and more particularly described as follows:

The electric distribution systems serving the following communities in Cumberland County, Kentucky:

Burkesville; Waterview; Dubree; Grider; Marrowbone.

The electric distribution systems serving the following communities in Metcalfe County, Kentucky;

Willow Shade; Summer Shade; Beaumont.

The electric distribution systems serving the community of Tompkinsville in Monroe County, Kentucky;

A certain electric line beginning at the city limits of Burkesville, Cumberland County, Kentucky, and extending

to Summer Shade, Metcalfe County, Kentucky, parallel with the Burkesville-Glasgow Highway (Kentucky Highway No. 90) and passing through the villages of Grider, Waterview and Marrowbone, all in Cumberland County, and Willow Shade and Beaumont, in Metcalfe County, a distance of approximately twenty-four (2) miles of which approximately thirteen and one-half (13½) miles are in Cumberland County and ten and one half (10½) miles in Metcalfe County;

Certain other transmission lines branching from the electric line mentioned above at the intersection of the Burkesville-Glasgow Highway and Kentucky Highway No. 163 paralleling said Highway No. 163 a distance of approximately eight (8) miles in Metcalfe County to Edmonton in Metcalfe County; and

Another certain electric line extending from Dubree, Cumberland County, Kentucky, and extending to Tompkinsville, Monroe County, Kentucky, via Leatherwood Creek for a distance of approximately three and one-half (3½) miles, then through the village of Persimmon in Monroe County, Kentucky, and then via Mount Hermon school and thence to a point on Kentucky Highway No. 100 approximately three (3) miles east of Tompkinsville and thence paralleling said Kentucky Highway No. 100 to the city limits of Tompkinsville, a total distance of approximately twelve and one-half (12½) miles of which approximately two and one-half (2½) miles are in Cumberland County and ten (10) miles are in Monroe County; and

II.

All service and connecting lines, poles, posts, cross-arms, wires, cables, conduits, transformers, insulators, meters, electrical connections, lamps, fuses, junction boxes, hardware, fixtures and other equipment, which at the date hereof are incorporated in or attached or connected to the lines mentioned, described or referred to in the preceding paragraph I as being included in this sale and conveyance, all of which shall be deemed to be a part thereof; and

III.

All easements, rights of way, or other interests in land or other contracts or privileges granted to or held or owned by Grantor giving to or vesting in Grantor the right, license, or privilege to construct, operate, or maintain upon lands owned or held by others, any part of the electric transmission or distribution lines herein described as being included in this sale and conveyance; and

51 IV.

All agreements and contracts granting privileges for railroad or power line or telephone or telegraph line crossings or joint use of poles or rights of way granted to or owned or held by Grantor with respect to the electric transmission and distribution lines herein described as being included in this sale and conveyance; and

V.

All licenses, franchises, ordinances, privileges or permits heretofore granted, issued or executed to, or owned or held by, Grantor by United States of America or by the Commonwealth of Kentucky, or by any county, municipality or political subdivision thereof, or by any agency, board, commission or department of any of the foregoing, authorizing the construction, operation or maintenance of the electric transmission and distribution lines herein described as being included in this conveyance, or any part thereof, but only to the extent that such licenses, franchises, ordinances, privileges or permits relate to said lines, and from the nature thereof, permit of such conveyance or assignment or partial conveyance or assignment; and

VI.

All customer records, customer contracts and agreements, customer books and records, customer accounting records, abstracts, deeds, maps, drawings, charts, tracings, blue prints, diagrams, engineering and accounting data pertaining to the relations between the Grantor and its customers or potential customers, together with all other records of every kind and character whatever pertaining to the properties herein conveyed.

Being in part the same property conveyed to the Grantor by L. R. Bardin, J. O. Alexander and Jesse Crowe, by deeds dated May 15, 1931, May 14, 1929, and Aug. 9, 1935, respectively, and recorded in the office of the Clerk of the
52 County Court of Metcalfe County, Kentucky, in Deed Book 37, page 259; Cumberland County, Kentucky, in Deed Book 52, page 284; and Monroe County, Kentucky, in Deed Book 16, page 157, respectively.

To Have And To Hold all of such properties whether real, personal or mixed and whether tangible or intangible, together with all and singular the equipment, hereditaments and appurtenances of and to the same belonging or in anywise appertaining to Grantees, their successors and assigns forever.

Grantor, for itself and its successors and assigns, covenants with Grantees and Grantees' successors and assigns in respect of all properties included within the sale and conveyance:

(a) That Grantor is lawfully seized in fee and possessed of all of said properties;

(b) That said properties and rights included within this grant, sale and conveyance are free from and clear of all liens and encumbrances of each and every nature whatsoever, except the lien of that certain mortgage deed of trust dated March 31, 1931, and recorded in Mortgage Book L, page 538 in the office of the Clerk of the County Court of Cumberland County, Kentucky and in Mortgage Book 1, page 97 in the office of the Clerk of the County Court of Monroe County, Kentucky, to the lien of which mortgage deed of trust this conveyance is subject, and except for the liens of ad valorem taxes not delinquent.

(c) That Grantor has good and lawful right to grant, bargain, sell, alien, enfeoff, remise, release, confirm, transfer and convey the same;

(d) That, except in respect of easements and rights of way along and over private property, Grantor and its successors and assigns will forever warrant and defend said properties and the title thereto against the lawful claims and demands of all persons whomsoever; and

53 (e) That in respect of said easements and rights of way along and over private property Grantor and its successors and assigns will forever warrant and defend said easements and rights of way and the title thereto against the lawful claims and demands of all persons claiming by, through, or under Grantor.

IN WITNESS WHEREOF, CUMBERLAND PUBLIC SERVICE COMPANY has caused this instrument to be made in its name and on its behalf by W. L. McComas, as its President, and has caused its seal to be hereunto affixed and attested by F. M. Mayes, as its Secretary, all as authorized by a resolution duly adopted by its Board of Directors, on this year and day first above written.

CUMBERLAND PUBLIC SERVICE COMPANY

(Seal) By W. L. McCOMAS

President

Attest:

F. M. MAYES,

Secretary.

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } ss.:

The undersigned, a Notary Public in and for the State and County aforesaid, does hereby certify that on this day the foregoing instrument of writing was produced to the undersigned in his said office by W. L. McComas, as President, and F. M. Mayes, as Secretary, respectively of Cumberland Public Service Company, a corporation, who thereupon executed, acknowledged, and delivered the same to be their voluntary act and deed as such officers of said corporation, and to be the official act and deed of said corporation by and through them as such officers.

WITNESS my hand and official seal this 22 day of October, 1940. My commission expires 12/19/43.

LILLIAN FLEISCHER,
Notary Public, Jefferson County, Kentucky.

54 *Exhibit "M" to Petition*

KNOW ALL MEN BY THESE PRESENTS: That W. L. McComas and Agnes O. McComas, his wife of Louisville, Kentucky and E. S. Mayes and Zana McElroy Mayes, his wife, of Springfield, Kentucky (said McComas and his wife and said Mayes and his wife being hereinafter collectively referred to as "Vendors"), for and in consideration of the sum of one dollar ($1.00) and other good and valuable considerations in hand paid by Tri-County Electric Membership Corporation (hereinafter called "Tri-County"), an electric cooperative corporation organized and existing under and by virtue of the laws of the State of Tennessee, at or before the sealing and delivering of these presents, receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, remised, released, transferred, confirmed, conveyed and delivered and do by these presents grant, bargain, sell, alien, enfeoff, remise, release, transfer, confirm, convey and deliver unto Tri-County, its successors and assigns, all of the electric transmission and distribution lines and facilities of Vendors which as of June 10, 1940, were operated by Cumberland Public Service Company, together with all improvements,

betterments and extensions to such properties made between said date and the date hereof, including, though not by way of limitation, the following described property situated in the Counties of Cumberland, Metcalfe and Monroe, in the Commonwealth of Kentucky, together with all the rights, privileges, appurtenances and facilities to said property in anywise appertaining or belonging, to wit:

I

The electric transmission and distribution lines and facilities of Vendors located in the Counties of Cumberland, Metcalfe and Monroe in the Commonwealth of Kentucky and more particularly described as follows:

55 The electric distribution systems serving the following communities in Cumberland County, Kentucky:

Burkesville Waterview Dubree
Grider Marrowbone

The electric distribution systems serving the following communities in Metcalfe County, Kentucky:

Willow Shade Summer Shade
Beaumont

The electric distribution systems serving the community of Tompkinsville in Monroe County, Kentucky:

A certain electric line beginning at the city limits of Burkesville, Cumberland County, Kentucky, and extending to Summer Shade, Metcalfe County, Kentucky, parallel with the Burkesville-Glasgow highway (Kentucky Highway No. 90) and passing through the villages of Grider, Waterview and Marrowbone, all in Cumberland County, and Willow Shade and Beaumont, in Metcalfe County, a distance of approximately twenty-four (24) miles of which approximately thirteen and one-half (13½) miles are in Cumberland County and ten and one-half (10½) miles in Metcalfe County;

Certain other transmission lines branching from the electric line mentioned above at the intersection of the Burkesville-Glasgow Highway and Kentucky Highway No. 163 paralleling said highway No. 163 a distance of approximately eight (8) miles in Metcalfe County to Edmonton in Metcalfe County; and

Another certain electric line extending from Dubree, Cumberland County, Kentucky, and extending to Tompkinsville, Monroe County, Kentucky, via Leatherwood Creek for a distance of approximately three and one-half (3½) miles, then through the village of Persimmon in Monroe

County, Kentucky. l then via Mount Hermon school and thence to a po[illegible] Kentucky Highway No. 100 approximately t[illegible]e (3) miles east of Tompkinsville and
56 thence paralleling said Kentucky Highway No. 100 to the city limits of Tompkinsville, a total distance of approximately twelve and one-half (12½) miles of which approximately two and one-half (2½) miles are in Cumberland County and ten (10) miles are in Monroe County; and

II

All service and connecting lines, poles, posts, cross-arms, wires, cables, conduits, transformers, insulators, meters, electrical connections, lamps, fuses, junction boxes, hardware, fixtures and other equipment, which at the date hereof are incorporated in or attached or connected to the lines mentioned, described or referred to in the preceding paragraph I as being included in this sale and conveyance, all of which shall be deemed to be a part thereof; and

III

All easements, rights of way or other interests in land or other contracts or privileges granted to or held or owned by Vendors giving to or vesting in Vendors the right, license or privilege to construct, operate or maintain upon lands owned or held by others, any part of the electric transmission or distribution lines herein described as being included in this sale and conveyance; and

IV

All agreements and contracts granting privileges for railroad or power line or telephone or telegraph line crossings or joint use of poles or rights of way granted to or owned or held by Vendors with respect to the electric transmission and distribution lines herein described as being included in this sale and conveyance; and

V

All licenses, franchises, ordinances, privileges, or permits heretofore granted, issued or executed to, or owned or held by, Vendors by United States of America or by the Commonwealth of Kentucky, or by any county,
57 municipality or political subdivision thereof, or by any agency, board, commission or department of any of the foregoing, authorizing the construction, operation or maintenance of the electric transmission and distribution lines herein described as being included in this convey-

ance, or any part thereof, but only to the extent that such licenses, franchises, ordinances, privileges or permits relate to said lines, and from the nature thereof, permit of such conveyance or asignment or partial conveyance or assignment; and

VI

All such: (a) customer records, customer contracts and agreements, customer books and records, customer accounting records; and (b) abstracts, deeds, maps, drawings, charts, tracings, blue prints, diagrams, engineering and accounting data, as pertain or refer to the relations between the Vendors and customers or potential customers of the Vendors or any of the grantors or assignors of the Vendors. Tri-County agrees to make available to the Vendors or any party in privity with them for examination and reproduction such documents and records delivered hereunder as may be requested by them and to preserve such documents and records for a period of not less than seven (7) years. All remaining records of every kind and character of the Vendors pertaining to the properties conveyed hereunder shall be retained and carefully preserved by the Vendors at the office of Cumberland Public Utilities Company at Burkesville, Kentucky, for a period of not less than seven (7) years or at such other place as may be mutually agreed upon between Tri-County and the Vendors. The Vendors agree to make available to Tri-County or any party in privity with them for examination and reproduction such of the documents, records and papers so retained as may be requested by Tri-County.

BEING, in part, the same property conveyed by Cumberland Public Service Company to Vendors by deed dated October 22, 1940 and recorded in the office of the
58 Clerk of the County Court of Cumberland County, in Deed Book 52, page 318; in the office of the Clerk of the County Court of Monroe County, Kentucky, in Deed Book 16, page 180, and in the office of the Clerk of the County Court of Metcalfe County, Kentucky, in Deed Book 37, page 270, and in part the same property conveyed to Cumberland Public Service Company by L. R. Bardin, J. O. Alexander, and Jesse Crowe, by deeds dated May 15, 1931, May 14, 1929, and August 9, 1935 respectively, and recorded in the office of the Clerk of the County Court of Metcalfe County, Kentucky, in Deed Book 37, page 259; Cumberland County Kentucky in Deed Book 52, page 284, and Monroe

County, Kentucky in Deed Book 16, page 157, respectively.

To Have And To Hold all of such properties whether real, personal or mixed and whether tangible or intangible, together with all and singular the equipment, hereditaments and appurtenances of and to the same belonging or in anywise appertaining to Tri-County, its successors and assigns forever.

Vendors, for themselves and their successors and assigns, covenant with Tri-County and Tri-County's successors and assigns in respect of all properties included within the sale and conveyance:

(a) that Vendors are lawfully seized in fee and possessed of all of said properties;

(b) that said properties and rights included within this grant, sale and conveyance are free from and clear of all liens and encumbrances of each and every nature whatsoever;

(c) that Vendors have good and lawful right to grant, bargain, sell, alien, enfeoff, remise, release, confirm, transfer and convey the same;

(d) that, except in respect of easements and rights of way along and over private property, Vendors and their successors and assigns will forever warrant and defend said properties and the title thereto against the lawful claims and demands of all persons whomsoever; and

59 (e) that in respect of said easements and rights of way along and over private property Vendors and their successors and assigns will forever warrant and defend said easements and rights of way and the title thereto against the lawful claims and demands of all persons claiming by, through or under Vendors.

Vendors will permit Tri-County free access to the records, maps, charts and diagrams of Vendors retained by Vendors, relating to the properties, business and operations included in this sale and conveyance.

The properties described herein as being included in this sale and conveyance are sold and conveyed as a going business and shall include the exclusive right as between the parties hereto and parties in privity with them to serve customers presently being served by said properties.

Vendors agree to make, execute, acknowledge and deliver or cause to be made, executed, acknowledged and delivered all such further instruments and conveyances and to take, or cause to be taken, all such further action as may

be reasonably requested by Tri-County to effectuate the intention of these presents.

This Deed and Bill of Sale may be simultaneously executed in any number of counterparts, and all of said counterparts executed and delivered, each as an original, shall constitute but one and the same instrument.

In Witness Whereof Vendors have hereunto set their hands and seals this 24 day of October, 1940.

W. L. McComas (Seal)
Agnes O. McComas (Seal)
E. S. Mayes (Seal)
Zana McElroy Mayes (Seal)

Executed by Vendors
in the presence of
Fay Shook
Arthur W. Grafton
Witnesses

60 Commonwealth of Kentucky }
County of Jefferson } ss.:

I, Lillian Fleischer, a notary public in and for the commonwealth and county aforesaid do certify that the foregoing instrument in writing from W. L. McComas and Agnes O. McComas, his wife, and E. S. Mayes and Zana McElroy Mayes, his wife, was this day produced to me in my county by the parties and acknowledged before me by the said W. L. McComas and Agnes O. McComas, his wife, and E. S. Mayes and Zena McElroy Mayes, his wife, respectively, to be their act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office this 24 day of October, 1940.

Lillian Fleischer
Notary Public

(Notarial Seal)
My commission expires 12/19/43.

61 *Exhibit "N" to Petition*

Cumberland Public Service Company
Burkesville, Kentucky

Gentlemen:

It is my understanding that you are preparing to dissolve your corporate existence and liquidate your physical

assets. I further understand that you desire to dispose of the following machinery and equipment now located in the cities of Burkesville and Tompkinsville:

1-ton 1937 Ford truck
1 60 h.p. Fairbanks-Morse Diesel engine direct connected to generator
1 120 h.p. Fairbanks-Morse Diesel engine direct connected to generator
1 200 h.p. Fairbanks-Morse Semi-Diesel engine direct connected to generator
1 5-ton York Ice Plant

together with switchboard equipment and engine auxiliaries used in connection with the above equipment

I hereby offer to pay to you the sum of $1,950.00 for the above described machinery and equipment. This offer is conditioned upon your extending to me the privilege of allowing this equipment to remain in the buildings in which it is now situated for a period of two years without charging any rent for such storage. If the machinery and equipment is not removed within such two-year period, I will discuss the question of future rentals or disposition of the machinery and equipment with the owner of the real estate.

Yours very truly,

(signed) E. S. Mayes

62 *Exhibit "O" to Petition*

WAIVER OF NOTICE

We the undersigned, being all of the members of the Liquidation Committee of Cumberland Public Service Company, do hereby waive notice of the time, place and purpose of the meeting of such Committee and fix the 16th day of November, 1940 at 10:30 o'clock a. m. as the time, and the office of Grafton & Grafton, Kentucky Home Life Building, Louisville, Kentucky, as the place of a meeting of said Committee; do hereby waive all requirements of the law of the State of Kentucky relative to the notice of such meeting, and do hereby consent to the transaction of such business as may come before such meeting, particularly the consideration of the liquidation of the remaining assets of this corporation.

W. L. McComas
E. S. Mayes

Minutes of Meeting of the Liquidation Committee of Cumberland Public Service Company

A meeting of the Liquidation Committee of Cumberland Public Service Company was held in the office of Grafton & Grafton in the Kentucky Home Life Building, Louisville, Kentucky, at 10:30 a. m. on November 16, 1940 pursuant to a waiver of notice signed by W. L. McComas and E. S. Mayes, being all of the members of such Committee. W. L. McComas and E. S. Mayes attended the meeting.

The Committee discussed means for accomplishing the liquidation of the remaining assets of the corporation, including the real estate, improvements, machinery, equipment, and accounts receivable. The Committee has attempted to secure offers for the remaining assets of the corporation and has been unsuccessful in obtaining
63 bids on the real estate other than the bid of W. L. McComas hereinafter referred to and has been able to obtain bids for the machinery and equipment only as junk values. It developed that the real estate and improvements are adapted to the specialized functions of producing electric power and ice, and that there is no market for these properties for such purposes. The machinery and equipment is obsolete and in bad condition.

After a discussion of the problems involved in attempting to carry on a continuing liquidation of the assets, it was determined that the Committee should dispose of the remaining assets either by sale or distribution immediately, so that the liquidation proceedings might be terminated. In view of the apparent difficulty of disposing of the machinery and equipment in a piecemeal fashion the Committee determined that the cost of such liquidation would exceed the possible increase in price which might be realized by proceeding in that manner.

The Committee then considered the bid of W. L. McComas for the real estate. Mr. McComas offered $1,550.00 for the lots and improvements located in Burkesville and Tompkinsville, Kentucky, exclusive of the machinery and equipment. Mr. McComas offered to permit the machinery and equipment now located in the building situated on the property to remain there for a period of not more than two years from the date of the offer. After a discussion of Mr. McComas' bid the following resolution was duly adopted by the Committee:

"RESOLVED FIRST that the bid of W. L. McComas dated November 9, 1940, offering to pay the sum of $1,550.00 for the two lots described in his bid be and the same is hereby accepted, provided that the corporation and its successors in title shall have the right to leave the machinery and equipment now located on such property at its present location until November 9, 1942 without charge for rent for such storage.

64 "RESOLVED SECOND that the Committee and the officers of the corporation be and they are hereby authorized and directed to convey said lots in the name of and on behalf of the corporation to W. L. McComas in fee simple with covenant of general warranty upon payment to the corporation of the sum of $1,550.00."

The Committee then considered the bid of E. S. Mayes for the machinery and equipment located on the property sold to Mr. McComas. Mr. Mayes offered $1,950.00 for all of the machinery and equipment so located, including the following:

1 1-ton 1937 Ford truck
1 60 h.p. Fairbanks-Morse Diesel engine, direct connected to generator
1 120 h.p. Fairbanks-Morse Diesel engine, direct connected to generator
1 200 h. p. Fairbanks-Morse Semi-Diesel, direct connected to generator
1 5-ton York ice plant
together with switchboard equipment and engine auxiliaries

subject to the condition that he be permitted to leave such machinery and equipment upon the property where it is now situated for a period of two years after the date of his bid without incurring liability for rent for such storage. After a discussion of Mr. Mayes' bid and the bids of the junk dealers for the machinery and equipment, it appearing that Mr. Mayes' was the highest and best bid, the following resolution was adopted:

"RESOLVED FIRST that the bid of E. S. Mayes dated November 12, 1940 offering to pay the sum of $1,950.00 for the machinery and equipment referred to above be and the same is hereby accepted.

"RESOLVED SECOND that the Committee and the officers of the corporation be and they are hereby auth-

65 orized and directed to convey such machinery and equipment to E. S. Mayes by an appropriate bill of

sale in the name of the corporation upon payment to the corporation of the sum of $1,950.00."

The Committee proceeded to discuss the bid of Mr. W. L. McComas and Mr. E. S. Mayes for the corporation's accounts receivable now carried on the corporation's books at $4,850.50. Mr. McComas and Mr. Mayes have offered to buy all of the accounts for $4,850.50 and to take an assignment of such accounts vesting them with authority to collect the same either in their own name or in the name of the corporation, the corporation to incur no expense in connection with such collections. After a consideration of said offer, it appearing that the price bid is the best obtainable, the following resolution was adopted:

"Resolved First that the bid of Mr. W. L. McComas and Mr. E. S. Mayes, dated November 12, 1940, offering to pay the sum of $4,850.50 for all of the corporation's accounts receivable be and the same is hereby accepted.

"Resolved Second that the Committee of the officers of the corporation be and they are hereby authorized and directed to assign said accounts to Mr. W. L. McComas and Mr. E. S. Mayes by instruments satisfactory to them, authorizing them to collect said accounts in their own name or in the name of the corporation, provided that the corporation shall incur no expense in connection with such collections. It appearing to the Committee that W. L. McComas has paid to the corporation the sum of $12,204.80 and that F. M. Mayes has paid to the corporation the sum of $8,129.70, such sums being the amounts advanced by the corporation for the payment of premium on the policies of insurance on the lives of W. L. McComas and F. M. Mayes respectively, the accounts relating to such transactions are now ordered closed."

66 It appeared to the Committee that all of the assets of the corporation have been disposed of with the exception of the $37,000.00 of first mortgage notes of Horse Cave Water Company. These securities are not of such account as to find a ready market, and it was decided that these notes be distributed in kind to the stockholders of the corporation. After a discussion of the advisability of such a distribution, the following resolution was adopted:

"Resolved that the officers of this corporation and the Committee be and they are hereby authorized and directed to endorse and deliver to W. L. McComas and

E. S. Mayes the $37,000.00 of first mortgage notes of Horse Cave Water Company pro rata in proportion to their ownership of capital stock of the corporation."

It appeared to the Committee that the sales herein authorized will produce the sum of $26,685.00 for distribution to the stockholders of the corporation, all of the debts of the corporation having been paid. It further appeared to the Committee that all of the stock of the corporation is owned as follows:

W. L. McComas	200 shares
E. S. Mayes	200 shares
Total	400 shares

The following resolution was adopted:

"RESOLVED that the officers of the corporation be and they are hereby authorized and directed to distribute the cash remaining in the hands of the corporation as of November 30, 1940 as follows:

W. L. McComas	$14,342.50
E. S. Mays	$14,342.50"

There being no further business the meeting was adjourned.

W. L. McCOMAS
E. S. MAYES

67 *Exhibit "P" to Petition*

BILL OF SALE

THIS BILL OF SALE made as of the 30th day of November, 1940 by and between Cumberland Public Service Company, a corporation, and W. L. McComas and E. S. Mayes, as members of the Liquidating Committee of Cumberland Public Service Company (hereinafter called vendors) to E. S. Mayes (hereinafter called vendee),

WITNESSETH:

That for and in consideration of the sum of Nineteen Hundred Fifty Dollars ($1,950.00) cash in hand paid by the vendee to the vendors, receipt of which is hereby acknowledged, the vendors have bargained and sold and by these presents sell, assign, convey and set over unto the vendee the following described personal property located in or upon or used in connection with the two certain parcels of real estate this day conveyed by the vendors to W. L. McComas, and being situated in Tompkinsville, Monroe

County, Kentucky and in Burkesville, Cumberland County, Kentucky:

1 1-ton 1937 Ford truck
1 60 h. p. Fairbanks-Morse Diesel engine direct connected to generator
1 120 h.p. Fairbanks-Morse Diesel engine direct connected to generator
1 200 h.p. Fairbanks-Morse Semi-Diesel direct connected to generator
1 5-ton York Ice Plant
together with switchboard equipment and engine auxiliaries

The vendors covenant that they are the true and lawful owners of the good chattels hereby conveyed, that they have full power and right to sell and convey the same,
68 that the same are free and clear of all liens and encumbrances whatsoever, and that they will warrant and defend the same against all claims and demands of all persons.

In Witness Whereof, Cumberland Public Service Company has caused this instrument to be made in its name and on its behalf by W. L. McComas, its duly authorized President and has caused its seal to be affixed and attested by F. M. Mayes, its duly authorized Secretary, and W. L. McComas and E. S. Mayes have hereunto set their hands as members of the Liquidation Committee of Cumberland Public Service Company, all as of this year and day first above written.

Cumberland Public Service Company
By W. L. McComas
President

(Seal)
Attest:
F. M. Mayes
Secretary

Liquidation Committee of Cumberland Public Service Company

By W. L. McComas
By E. S. Mayes

State of Kentucky }
County of Cumberland } ss:

I, Paul A. Davis, a Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing instrument of writing was produced to me in my said office

by W. L. McComas as President of Cumberland Public Service Company, a corporation, and by W. L. McComas as a member of the Liquidating Committee of Cumberland Public Service Company, who theretofore executed, acknowledged, and delivered the same to be his voluntary act and deed as such officer of such corporation and as such member of such Liquidation Committee, and to be
69 the voluntary act and deed of said corporation and said Liquidation Committee by and through him as such officer and member. Witness my hand and seal this 31 day of Dec., 1940. My commission expires April 6th, 1942.

(Seal) PAUL A. DAVIS,
Notary Public, Cumberland County, Kentucky.

STATE OF KENTUCKY }
COUNTY OF WASHINGTON } ss:

I Julia Wharton, Notary Public in and for the State and County aforesaid do hereby certify that on this day the foregoing instrument of writing was produced to me in my said office by F. M. Mayes as Secretary of Cumberland Public Service Company, a corporation, and by E. S. Mayes as a member of the Liquidation Committee of Cumberland Public Service Company, who thereupon executed, acknowledged and delivered the same to be their voluntary act and deed as such officer and member of said corporation and said Liquidation Committee, and to be the voluntary act and deed of said corporation and said Liquidation Committee by and through them as such officer and member respectively. Witness my hand and seal this 31st day of December, 1940. My commission expires 11-17-44.

(Seal) JULIA WHARTON,
Notary Public, Washington County, Kentucky.

70 *Exhibit "Q" to Petition*

Cumberland Public Service Company
Burkesville, Kentucky

Gentlemen:

I understand that you are in the process of dissolving as a corporation and are attempting to liquidate all of the corporate assets. I further understand that among the assets which you seek to liquidate is included certain real estate and improvements located in the cities of Tompkinsville and Burkesville, Kentucky, more particularly described as follows:

In Tompkinsville, a certain tract of land on Center Point Road containing about three-eighths of an acre, together with the power station and any other improvements now situated on that lot, but not including any machinery or equipment used in connection with the property.

In Burkesville, the lot adjoining the Burkesville Garage upon which the ice plant and generating plant is now situated, together with the improvements situated on that lot, but not including any of the generating or ice plant machinery or equipment.

I hereby offer to pay to you the sum of $1,550.00 for a good and merchantable fee simple title to the property referred to above to be conveyed to me by a general warranty deed. I understand that certain machinery and equipment is located in the buildings situated on these lots. It is not my intention to make any offer on this machinery and equipment, and should this offer be accepted I agree that the machinery may remain in the buildings for a period of not more than two years from the date of this offer. During such two-year period I understand that I shall not be entitled to charge or collect any rent for the machinery and at the end of such two-year period if such machinery and equipment has not been removed, I will discuss with the owner of the machinery the question of its ultimate disposition.

Yours very truly,

(Signed) W. L. McComas.

71 *Exhibit "R" to Petition*

DEED

THIS DEED made as of the 30th day of November, 1940 by and between Cumberland Public Service Company, a corporation, and W. L. McComas and E. S. Mayes, as the Liquidation Committee of Cumberland Public Service Company (hereinafter called grantors) to W. L. McComas (hereinafter called grantee)

WITNESSETH:

That for and in consideration of the sum of Fifteen Hundred Fifty Dollars ($1,550.00) cash in hand paid by said grantee to said grantors, receipt of all of which is hereby acknowledged, the grantors have bargained and sold and do by these presents grant, convey and set over unto the grantee, his heirs and assigns, in fee simple with covenant of General Warranty, the following described real property

together with all of the appurtenances thereunto belonging:

Track No. 1. That certain parcel of land lying and being in the Town of Tompkinsville, Monroe County, Kentucky, beginning at an iron pin in the rock in the branch headwaters of Mill Creek; thence North 80 West 12 poles to a stone near the forks of the Center Point Road; thence North 10 East 1 pole 3½ links to a stone on the side of the Center Point Road; thence North 48 East 3½ poles to a stone; thence South 85 East 15 poles to a stone; thence South 3 West 5 poles to a stone in Ed Richardson's line near a large sycamore; thence with said line to the beginning, containing about three eighths of an acre, being the same property conveyed to Cumberland Public Service Company by deed dated Jan. 29, 1929 and recorded in Deed Book 10, Page 415 in the office of the Clerk of the County Court of Monroe County, Kentucky.

72 Tract No. 2. That certain plat or parcel of land situated, lying, and being in the Town of Burkesville, Cumberland County, Kentucky, bounded and described as follows, to-wit: Beginning on the East side of back street in line of lot now owned by J. W. Smith, formerly owned by S. J. Smith, at a branch; thence with the line of the Smith lot down branch in Easterly course 85 feet to a stake; thence a Southwest course 8 feet to North wall of the brick building; thence with the brick building along the outside thereof 8 feet to the West wall of the Burkesville Garage workshop, a brick building; thence with the outside of the West wall of said shop building a Southwest course along the West wall 40½ feet to the center of said shop building; thence in a Northwest course with the outside of the South wall of the brick building 8 feet; thence a Southwest course with the old line between lot conveyed by W. E. Miller and wife to Less McComas and the Burkesville Garage lot 30 feet to a wire fence; thence Northwest course with the wire fence as it now stands 86 feet to a point in the back street 81 feet from the beginning corner; thence a Northwest course with said back street 81 feet to the beginning, being the same property conveyed to Cumberland Public Service Company by deed dated Jan. 28, 1929 and recorded in Deed Book 46, Page 349 in the office of the Clerk of the County Court of Cumberland County, Kentucky.

To Have And To Hold said tracts or parcels of land unto the grantee, his heirs and assigns forever, in fee simple with covenant of General Warranty.

The grantors further covenant that they are the true and lawful owners of the property hereby conveyed, that they have full power and right to convey the same, that the same is free and clear of all liens and encumbrances whatsoever, except city and state and county taxes for the year 1940 and that they will warrant and defend the same from all claims and demands of all persons.

73 In Witness Whereof, Cumberland Public Service Company has caused this instrument to be made in its name and on its behalf by W. L. McComas, its duly authorized President and has caused its seal to be affixed and attested by F. M. Mayes, its duly authorized Secretary, and W. L. McComas and E. S. Mayes have hereunto set their hands as members of the Liquidation Committee of Cumberland Public Service Company, all as of this year and day first above written.

Cumberland Public Service Company
(Seal) By W. L. McComas,
President.

Attest:
F. M. Mayes, *Secretary.*

Liquidation Committee of Cumberland
Public Service Company
By W. L. McComas
By E. S. Mayes

State of Kentucky)
County of Cumberland) ss:

I, Paul A. Davis, a Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing instrument of writing was produced to me in my said office by W. L. McComas as President of Cumberland Public Service Company, a corporation, and by W. L. McComas as a member of the Liquidation Committee of Cumberland Public Service Company, who theretofore executed, acknowledged and delivered the same to be his voluntary act and deed as such officer of such corporation and as such member of such Liquidation Committee, and to be the voluntary act and deed of said corporation and said Liquidation Committee by and through him as such officer and member. Witness

my hand and official seal this 31 day of Dec., 1940. My commission expires April 6th, 1942.

(Seal) PAUL A. DAVIS,
Notary Public, Cumberland County, Kentucky.

74 STATE OF KENTUCKY }
COUNTY OF WASHINGTON } ss:

I, Julia Wharton, a Notary Public in and for the State and County aforesaid, do hereby certify that on this day the foregoing instrument of writing was produced to me in my said office by F. M. Mayes as Secretary of Cumberland Public Service Company, a corporation, and by E. S. Mayes as a member of the Liquidation Committee of Cumberland Public Service Company, who thereupon executed, acknowledged and delivered the same to be their voluntary act and deed as such officer and member of said corporation and said Liquidation Committee, and to be the voluntary act and deed of said corporation and said Liquidation Committee by and through them as such officer and member respectively. Witness my hand and seal this 31st day of December, 1940. My commission expires 11-17-44.

(Seal) JULIA WHARTON,
Notary Public, Washington County, Kentucky.

75 *General Traverse—Filed April 16, 1946.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) SEWALL KEY
J.H.S. Acting Assistant Attorney General.

Argument and submission of case

On February 9, 1949, the case was argued and submitted on merits by Mr. Cornelius W. Grafton for plaintiff and by Mr. J. H. Sheppard for defendant.

77 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J. Dissenting opinion by Madden, J.—Filed May 2, 1949*

Mr. Cornelius W. Grafton for plaintiff. *Mr. Henry H. Mathis*, and *Messrs. Wyatt, Grafton & Grafton* were on the brief.

Mr. J. H. Sheppard, with whom was Mr. Assistant Attorney General Theron Lamar Caudle, for the defendant. *Messrs. Robert N. Anderson* and *Andrew D. Sharpe* were on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. Cumberland Public Service Company (herein sometimes called "Cumberland"), a Kentucky corporation, was organized in 1929 to engage in the business of generating electricity and distributing it at retail in an area comprising three counties in Southern Kentucky. It had an authorized capital stock of 500 shares, of which only 400 were ever issued. These were issued as follows:

	Shares
W. L. McComas	200
E. S. Mayes	197
W. F. Grigsby	3

2. In 1937, W. L. McComas transferred 40 shares to himself as trustee for his daughter, Elizabeth O. McComas, and 40 shares each to himself as trustee for his three sons, D. Keith McComas, W. Leslie McComas, Jr., and Jack D. McComas, retaining 40 shares in his own name. In 1937, Finley M. Mayes acquired the three shares theretofore standing in the name of W. F. Grigsby. At the same time E. S. Mayes transferred to Finley M. Mayes 47
78 shares, to Zana M. Mayes 50 shares, and to Katherine T. Mayes 50 shares. As a result of the above transfers, late in 1937, the stockholdings were as follows:

	Shares
E. S. Mayes	50
Zana M. Mayes (wife of E. S. Mayes)	50
Finlay M. Mayes (son of E. S. Mayes)	50
Katherine T. Mayes (wife of Finley)	50
W. L. McComas	40
W. L. McComas, Trustee for Elizabeth O. McComas, (daughter)	40
W. L. McComas, Trustee for D. Keith McComas (son)	40
W. L. McComas, Trustee for W. Leslie McComas, Jr. (son)	40
W. L. McComas, Trustee for Jack D. McComas (son)	40
Total shares outstanding	400

3. On or about March 17, 1941, the plaintiff corporation filed with the appropriate Collector of Internal Revenue its final corporation income tax, declared value, excess profits tax and defense tax return for the calendar year 1940 and reported therein a loss of $7,602.49 and no tax liability. In the computation of such loss, the plaintiff disclosed the various transactions here involved with regard to the sale of the transmission and distribution lines and equipment to Tri-County Electric Membership Corporation (herein sometimes called "Tri-County") and alleged in the return that such sale had been made by the stockholders and not by the corporation. The return further disclosed the sale to Messrs. McComas and Mayes of the real estate at Burkesville and Tomkinsville, Kentucky, and the machinery and equipment referred to hereinbefore. In the return the plaintiff claimed a deduction from gross income, as a loss, the difference between the depreciated book values of such property and the prices at which the property was sold to Messrs. McComas and Mayes. In the computation of the loss the plaintiff disclosed in the return the transactions by which the transmission and distribution lines and equipment were sold to Tri-County and claimed that the sale had been made by the stockholders after a distribution of the assets to the stockholders. The return further disclosed as contributing to the loss the sales by the corporation
79 of certain real estate and machinery and equipment to two of the stockholders at less than the book value thereof.

The Commissioner of Internal Revenue, in his audit of the return, made adjustments which resulted in a deficiency in tax. The Commissioner determined that the property had been sold by the corporation rather than by the stockholders and also disallowed the losses claimed from the sales of the other property to the stockholders. The asserted deficiency of $17,054.70 was duly assessed and, together with interest thereon, was paid by the plaintiff as follows:

Deficiency.....	$17,054.70.	Paid Oct. 15, 1943.
Interest.....	$ 2,643.48.	Paid Dec. 16, 1943.

The said sum of $19,698.18 was procured by plaintiff by pro rata assessments against its former stockholders, since all of the assets of the corporation had theretofore been distributed in liquidation.

4. On July 26, 1944, the plaintiff filed a claim for refund with the Commissioner of Internal Revenue seeking a refund of taxes for the year 1940 in the amount of $19,698.18

paid as aforesaid. In claim the plaintiff alleged that the Commissioner of Internal Revenue had erred in his determinations that the sale to Tri-County of plaintiff's transmission and distribution lines and facilities had been made by the corporation rather than its stockholders and that the plaintiff was not entitled to the losses claimed in its return of the difference between the depreciated book values of the property sold to Messrs. McComas and Mayes and the amounts for which such property was so sold.

By registered letter dated August 18, 1945, the Commissioner of Internal Revenue rejected plaintiff's claim for refund in full.

Sale of Distribution Properties

5. Tri-County Electric Membership Corporation is a cooperative corporation which was organized under the laws of Tennessee in 1936. Tri-County obtained electrical energy from Tennessee Valley Authority and distributed it in an area comprising six counties in Tennessee and six counties in Kentucky, including three Kentucky counties served also by Cumberland. From its organization, it was the plan and purpose of the manager of Tri-County to
80 acquire the transmission and distribution system owned and operated by Cumberland. Tri-County did not have any substantial funds of its own. Whenever it considered the acquisition of substantial additions to its electric distribution systems, it turned to the Rural Electrification Administration, Washington, D. C., (sometimes called "REA") for a loan sufficient to pay the purchase price. REA was accustomed to making such loans to local cooperatives if the REA engineers considered the price to be satisfactory and the investment sound. Soon after Tri-County began operating, it became evident to the officers of Cumberland that Cumberland would have either to acquire power from Tennessee Valley Authority or sell its properties to Tri-County, and negotiations to that end continued more or less regularly thereafter. In October 1939, W. L. McComas called upon J. A. Krug, Chief Power Engineer, Tennessee Valley Authority, for the purpose of ascertaining whether power could be secured from the Tennessee Vally Authority, or, if not, if a sale of plaintiff's properties could be effected. The price asked for the properties by Mr. McComas was $156,000 which was based on an appraisal made in July 1939, a copy of which had been previously furnished to Mr. Krug and which indicated the following values for the property named:

Generation:	
A. Burkesville:	
I. Land	$ 2,000.00
II. Buildings:	
a. Generating Plant	3,500.00
b. Storage	500.00
III. Equipment:	
a. Diesel Power Units Alter. Exciters, Sw. Bd. & Misc. Aux. Equipment	28,955.51
B. Tomkinsville:	
I. Land	750.00
II. Buildings	1,000.00
III. Equipment:	
a. Obsolete equipment	300.00
	37,005.51
Transmission and Distribution Lines and Equipment	80,547.92
Refrigeration Equipment	5,854.70
Trucks	900.00
Construction Expense and Going Concern Value	32,229.27

81 6. On February 16, 1940, representatives of plaintiff met with representatives of the REA at Murfreesboro, Tennessee, and for several days discussed the possibility of the acquisition by Tri-County of the transmission and distribution lines of the plaintiff. The officers of the plaintiff desired to sell the entire plant as a going concern and offered to sell all the stock of the corporation to Tri-County for the sum of $156,000, which was the value determined for its facilities in an appraisal which had previously been made. However, plaintiff's officers were advised that Tri-County was not interested in acquiring either the generating plants of plaintiff or an ice plant which it operated and that Tri-County desired to purchase only plaintiff's transmission and distribution lines. This was because Tri-County had an adequate source of energy supplied by Tennessee Valley Authority. Thereupon, plaintiff's officers offered to sell the stock of the company for the sum of $115,000 with the understanding that the generating plants and the ice plant would be disposed of prior to the sale. The difference between the original price suggested of $156,000 and the reduced figure of $115,000 represented the approximate appraised value of the generating equipment and the ice plant.

Prior to this meeting Mr. McComas and his counsel had discussed the method of making the sale and had agreed that it should be made by a sale of the stock by the stockholders, and not by a sale of the physical properties by the corporation. Representatives of the REA expressed some doubt as to whether or not that organization could finance a purchase of the stock of the company, but the determination of this question was deferred until the legal representatives of the REA in Washington could be consulted.

7. On April 2, 1940, William Parker, president of Tri-County, addressed a letter to the Deputy Administrator of the REA containing the following:

* * * * * *

> We have been negotiating with the owners of the Cumberland Public Service Company, a small independently owned utility, which can be bought, we believe, at a figure of around $100,000. The Cumberland Public Service Company last year grossed about $40,000. It incorporates in its territory one of the richest agricultural areas in either Tennessee or Kentucky; the farmers of this section have repeatedly
> 82 petitioned us to serve them. There are now between eight hundred (800) and nine hundred (900) customers served by the Cumberland Public Service Company with over two hundred (200) additional farmers living along the transmission lines now connecting their towns. The economic conditions in this area and of the customers are unusually good.
>
> We would greatly appreciate your help in our acquisition of this property as we believe that it is of greatest importance to this cooperative.

8. On April 11, 1940, Mr. W. E. Herring, consulting engineer of the REA, addressed a letter to W. L. McComas reading as follows:

> A thorough study of the Cumberland Public Service Company's lines which we discussed while I was in Murfreesboro, Tennessee, discloses that we would not be warranted in approving a purchase price in excess of $86,750 for the property. This would mean that for this price you would turn over to the Tri-County Electric Membership Corporation a deed for the Cumberland Public Service Company's property exclusive of the generating plant at Burkesville and the ice plant. We would also require that the ice plant sign a three-year contract with the cooperative for its energy re-

quirements. If this price is satisfactory to you, we can have the necessary papers prepared covering the sale of the property. In the event that the sale is consummated, we would require certain additional information, of which I am writing you in a separate letter.

You will recall that I told you that there would be no money available for this purchase until July 1, the beginning of the next fiscal year and then only, of course, if Congress made appropriations for us. You seemed to feel that there would be no difficulty in working out some kind of a plan for the purchase to go through at present and payment to be made on or after July 1, provided funds were made available to us by Congress.

9. Mr. McComas, after consultation with Mr. Mayes, declined to accept the offer set out in finding 8. On May 15, 1940, they sent Mr. Arthur Grafton to Washington to consult with the REA. At that conference the legal department of the REA definitely advised Mr. Grafton that the REA could not lawfully advance money to Tri-County for the acquisition of the stock of plaintiff, but could advance money for the purchase of the properties themselves.

83 Mr. Herring, representing the REA, then made an offer of $104,000 for the physical properties desired. This offer was communicated to McComas and Mayes by Grafton. McComas and Mayes then directed Grafton to write to Herring the following letter:

Upon my return from Washington I reported our conversation to Messrs. McComas and Mayes, who felt that prior to making a commitment they should seek to ascertain what the taxes would run. We immediately employed a certified public accountant who is at Burkesville today getting certain information from the books and we are exploring two or three methods of handling the matter with possible taxes involved in each method. It will probably be the end of the week before we are able to say with any degree of assurance what the taxes will be, and until that time I am afraid my clients will be unable to make up their minds.

* * * * *

10. Plaintiff's officers employed a firm of certified public accountants to prepare computations of the taxes which would be incurred in various ways of making the sale of the properties desired by Tri-County, that is, either by a

sale of these properties by the plaintiff corporation, or by a sale of the stock in the company by the stockholders, or by dissolution of the company and a distribution of the assets to the stockholders, and a subsequent sale of the assets by the stockholders. After receiving the computations, plaintiff's officers and counsel had a conference for the purpose of considering the tax liability resulting from various ways in which the properties could be sold to Tri-County.

11. As a result of the above conference plaintiff's counsel, on May 31, 1940, addressed the following letter to W. E. Herring:

> Since my conversation with you on May 15, 1940, I have consulted with Messrs. McComas and Mayes and have in their behalf now completed a survey of the problems which would be involved in a sale to you. After considering the net result to the corporation, the directors of Cumberland Public Service Company have determined that the corporation will not accept an offer of $104,000.00 for the transmission and distribution lines.
>
> Mr. McComas and Mr. Mayes individually, however, are willing to enter into a contract with the co-
> 84 operative in such form as will be acceptable to your administration under the following terms and conditions.
>
> (1) Messrs. McComas and Mayes as individuals will acquire the transmission and distribution lines of Cumberland Public Service Company and will agree to deed the same to the cooperative for a consideration of $104,000.00, such delivery and such payment to be made as soon as practicable after September 1, 1940, and in any event within thirty days thereafter.
>
> (2) The cooperative will immediately and in any event, on or before June 10, 1940, without expense to my clients, procure whatever permission is necessary and make whatever connections are necessary to furnish to Cumberland Public Service Company or to Messrs. McComas and Mayes, if they are then the owners of the transmission and distribution lines, such power at standard TVA rates as they may need to supply that system.
>
> (3) From and after the acceptance of this proposal, if accepted, Messrs. McComas and Mayes will cause the same service to be made available to the customers of Cumberland Public Service Company and at the same rates until the date of the delivery of the deed as set

out in paragraph (1) so that you will be assured of a going concern being conveyed to you. During this period the cooperative is to have the right to either (a) make any additions or extensions or improvements on the transmission and distribution lines at the expense of such cooperative or (b) upon the specific order and direction of the cooperative, Messrs. McComas and Mayes will cause such extensions, improvements and additions to be made and the actual cost thereof will be added to the purchase price.

(4) On or before the date of the delivery of the deed, Messrs. McComas and Mayes will pay or cause to be paid all state, county, city, school district or other ad valorem taxes on said transmission and distribution lines then payable, but subject to such ad valorem taxes as may be by law then a lien against the property but not yet due and payable.

The reason for postponing delivery of the deed to September 1st or thereafter is because that I have now ascertained that the mortgage securing the outstanding bonds of the company provides that the bonds are callable on interest payment dates only and the next interest payment date is September 1st. As I told you in Washington a substantial part of the bonds are held by friends of Messrs. McComas and Mayes but some of the bonds are otherwise held and we find that we can not count on being able to get them in and so release the mortgage prior to September 1st.

As I explained to you in Washington, the power situation is an acute problem and while it is entirely agreeable to my clients to enter into an agreement looking to a deilvery of the property in the future they can only do so in the event they are assured there will be no breakdown in the meantime. You advised me that you thought you could get from TVA permission for temporarily supplying such current where there was an actual contract under which the cooperative was to acquire the property and I assume that you have not found TVA's attitude to the contrary.

The foregoing conditions have been discussed informally by Mr. McComas with Mr. Sullivan in an attempt to find some way in which to make the deal. It will probably take not less than two or three months in any event to complete the corporate transactions necessary to the delivery of the property in such form as is desired by your legal staff, and Mr. Sullivan expressed

the view that it was to the advantage of the cooperative to have some two or three months in which to get the improvements made before actually taking over the property, as he anticipated a rush of new customers at that time.

I am sending copies of this letter to Mr. McComas who will doubtless furnish one to Mr. Sullivan or to Mr. Parker. As soon as you have consulted with these gentlemen and can advise me whether our suggestions are practical, I will be delighted to have my clients meet you at such time and place as is convenient for a more formal agreement to work it out.

12. After arrangements had been completed for the furnishing of power by Tennessee Valley Authority, the offer of May 31 was accepted by Tri-County. By an instrument dated June 10, 1940, W. L. McComas and E. S. Mayes agreed to sell, and Tri-County agreed to purchase the facilities of plaintiff desired by Tri-County. Such instrument contained the following provisions:

* * * Whereas, Vendors expect to acquire all of such electric transmission and distribution lines and facilities of Cumberland and, in the event of such acquisition, desire to sell to Tri-County the electric transmission and distribution lines and facilities so acquired immediately upon such acquisition, and Tri-County is willing to purchase such electric transmission and distribution lines and facilities upon the terms and conditions herein set forth:

86 Now, therefore, for and in consideration of the mutual agreements herein contained, the parties hereto covenant, promise and agree as follows:

SECTION 1. Vendors shall grant, bargain, sell, alien, enfeoff, remise, release, convey, confirm, transfer and deliver to Tri-County the property more particularly described in the Deed and Bill of Sale, marked "Exhibit A", attached hereto and by this reference made a part hereof, with such additions and betterments as may be made to the existing system of Cumberland between the date of this contract and the Closing Date hereinafter provided for, all with covenants of warranty as set forth in such Exhibit A, free and clear of all liens and encumbrances of every kind and nature whatsoever, except ad valorem taxes which are to be prorated and provided for as set forth in Section 5 hereof. Such properties shall be conveyed as a going electric system with the exclusive right as between the

parties hereto and parties in privity with them to serve the consumers being served through such properties at the time of such conveyance. The Deed and Bill of Sale shall be executed and delivered in a sufficient number of counterparts to permit Tri-County to record such instruments simultaneously in the three counties in which the property to be acquired is located.

SECTION 2. In consideration of such sale, conveyance and delivery, Tri-County shall pay to Vendors on the Closing Date the sum of One Hundred Four Thousand Dollars ($104,000) * * *.

The effective date of this sales agreement was June 10, 1940, but the signatures of the parties were actually affixed thereto at a later date.

13. On or about August 9, 1940, D. Keith McComas, W. Leslie McComas, Jr., Jack D. McComas, and Elizabeth O. McComas entered into a written contract with W. L. McComas by which they appointed W. L. McComas their agent to assist in the liquidation of Cumberland and to receive for them their distributable portion of the assets of the corporation. The stock theretofore standing in the name of W. L. McComas as Trustee for each of them was then transferred on the records of the corporation to W. L. McComas individually.

14. Under date of August 9, 1940, Zana M. Mayes and Katherine T. Mayes executed a similar written contract with E. S. Mayes, and they then transferred to E. S. Mayes on the records of Cumberland the 50 shares of stock theretofore standing in the name of each of them.

87 Finley M. Mayes did not transfer his 50 shares to E. S. Mayes at that time because they were advised that Kentucky law required a corporation to have three directors, and that only stockholders could serve as directors.

The stock of the corporation was transferred on the records of plaintiff, and from August 10, 1940, such records showed the ownership of the stock as follows:

	Shares
W. L. McComas	200
E. S. Mayes	150
Finley M. Mayes	50

15. At a special meeting of the plaintiff's stockholders on August 13, 1940, at 2 p. m., the following resolution was adopted:

WHEREAS, it is considered that the best interests of the stockholders of this corporation will be served by

an immediate dissolution of said corporation and a liquidation of its properties.

BE IT RESOLVED that this corporation be dissolved in accordance with the laws of the State of Kentucky and the Board of Directors and the persons selected by them be and they are empowered, authorized, and directed to take all steps which shall be necessary or desirable to effect the dissolution of this corporation, the liquidation of its assets and liabilities, and the distribution to its stockholders in cash or in kind of all of its assets which shall not be required to pay all of its outstanding indebtedness.

16. At 2:30 p. m. on August 13, 1940, the Board of Directors of the plaintiff corporation held a special meeting for the purpose of transacting the business disclosed by the following minutes of the meeting:

SPECIAL MEETING OF BOARD OF DIRECTORS OF CUMBERLAND PUBLIC SERVICE COMPANY

At a meeting of the Board of Directors of Cumberland Public Service Company, held at the office of Grafton & Grafton, Kentucky Home Life Building, Louisville, Kentucky, on the 13th day of August, 1940, at two-thirty p. m., all of the directors of this corporation being present, there was produced before and examined by said meeting a resolution of the stockholders of this corporation authorizing a dissolution of said corpo-
88 ration and authorizing and directing the Board of Directors to take such action as might be necessary or desirable to effect the dissolution of the corporation, the payment of its debts, and the distribution of its remaining assets to the stockholders, and said resolution having been discussed at this meeting, the following resolution was offered:

"RESOLVED FIRST, that W. L. McComas and E. S. Mayes be and they are hereby constituted a committee for liquidation and said committee be and is hereby authorized and directed to take such action as shall be necessary or desirable for the purpose of realizing upon the assets of the corporation the payment of its debts and the distribution to the stockholders of the assets of the corporation which shall remain after provision for the payment of said debts shall have been made.

"RESOLVED FURTHER, that said liquidation committee be and they are hereby authorized and directed to set

aside from the assets of the corporation a fund sufficient to pay all of the debts of said corporation.

"RESOLVED FURTHER, that W. L. McComas as President, and F. M. Mayes as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the date of such conveyance all of the electric transmission and distribution facilities of this corporation located in the counties of Cumberland, Metcalfe, and Monroe in the Commonwealth of Kentucky, together with all services and connecting lines, fixtures and equipment used in connection therewith, and together with all easements, rights of way, or other interests in lands used in connection with such transmission and distribution lines, and all other rights, licenses, franchises, privileges, or permits used in connection with said lines, and that said officers be and they are hereby authorized and directed to execute, acknowledge, and deliver for and on behalf of this corporation such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

Upon motion duly made and seconded the foregoing resolution was unanimously adopted.

17. As the plaintiff was in the utility business, it was subject to the jurisdiction of the Public Service Commission of Kentucky. Therefore, all contemplated transactions affecting its business were required to have the approval of that Commission.

89 On or about September 4, 1940, a document was filed before the above-named commission entitled:

In the Matter of the Joint Application of Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation for the Sale and Purchase of Utility Properties

This application represented that W. L. McComas and E. S. Mayes were the principal stockholders of the Cumberland Public Service Company; that the corporation was taking the necessary steps under Kentucky law to dissolve and terminate its corporate existence; that as a part of this plan its electric transmission and distribution system would be conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend; that W. L. McComas and E. S. Mayes desired to sell such property to the Tri-County Electric Membership Corporation and that Tri-County desired to purchase such property; that upon the conveyance of the property by

the corporation to McComas and Mayes, the corporation would cease the operation thereof and such operation would be continued by McComas and Mayes until the bill of sale and transfer of title to Tri-County and that Tri-County desired to begin the operation of the properties immediately upon delivery to it of the deed from McComas and Mayes. The application concluded with a prayer for an order by the Public Service Commission authorizing the consummation of the proposed dissolution, operation, sale and purchase of the utility properties therein described. All parties interested in the consummation of the plan affixed their signatures to the application.

By order dated September 27, 1940, the Public Service Commission of Kentucky granted the aforesaid application on the condition that the transactions therein set out be consummated without any interruption of or impairment to the service being rendered to the customers of the Cumberland Public Service Company.

Notice of the dissolution of the Cumberland Public Service Company was duly published in appropriate newspapers and all other formalities required by law to complete the dissolution of the plaintiff corporation were duly complied with.

18. On October 21, 1940, Finley M. Mayes endorsed and surrendered to E. S. Mayes the certificates repre-
90 senting his stock in the plaintiff corporation in the amount of 50 shares. This was done pursuant to a previous oral agreement between the parties.

19. On or about October 31, 1940, plaintiff corporation filed with the Collector of Internal Revenue a "Return of Information under Section 148 (d) of the Internal Revenue Code to be filed by Corporations within 30 Days after Adoption of Resolution or Plan of Dissolution or Complete or Partial Liquidation" in which it set forth certain information relative to its corporate existence and that the adoption of the resolution or plan of dissolution or complete or partial liquidation had occurred on August 13, 1940.

20. On October 22, 1940, the plaintiff corporation, by its president, W. L. McComas, executed a deed and bill of sale to W. L. McComas and E. S. Mayes, under the terms of which the grantor conveyed to the grantees the transmission and distribution lines and facilities which Tri-County desired to purchase.

21. By instrument dated October 24, 1940, W. L. McComas, and Agnes O. McComas (his wife) and E. S. Mayes and Zana McElroy Mayes (his wife) as vendors conveyed

the above properties to Tri-County Electric Membership Corporation. At the time of the delivery of the aforesaid instrument, the consideration of $104,000 was paid with appropriate adjustments to the effective date of the sale.

Losses on Sale of Other Properties

22. After the transfer by plaintiff to W. L. McComas and E. S. Mayes of its transmission and distribution lines, which in turn were transferred to Tri-County as aforesaid, the plaintiff continued to own an electric light plant, an ice plant, certain property in Burkesville and Tomkinsville, Kentucky, a Ford truck, certain accounts receivable and two life insurance policies, one covering W. L. McComas and the other E. S. Mayes. The plaintiff also continued to own certain notes of the Horse Cave Water Company aggregating $37,000.

23. In the return filed by the corporation there was a claimed loss resulting from the sale of machinery and equipment. The book value of this property was $8,164.99 and the indicated sale price was $1,950, showing a loss of
91 $6,214.99. The return also disclosed a loss of $1,290.12 resulting from the sale for $1,550 of real estate of a book value of $2,840.12.

24. Between August 19, 1940, and November 16, 1940, some attempts were made by the company to dispose of the machinery and equipment constituting the generating plant and ice plant which the company had been operating but which were not acquired by Tri-County. Some possible purchasers investigated the properties but no offer was received. The generating equipment was heavy, weighing between 50,000 and 100,000 pounds, and it was installed on deep concrete foundations in buildings on the real estate owned by the company. One of the generators was 20 years old, and the others were about 30 years old. These models were no longer manufactured and it was difficult to obtain spare parts when necessary. On November 16, 1940, Mr. W. L. McComas and Mr. E. S. Mayes, acting as a liquidation committee, held a meeting, at which time Mr. E. S. Mayes offered $1,950 for all the machinery and equipment, including one 1-ton Ford truck, located on the property at Burkesville and Tomkinsville, subject to the condition that he be permitted to leave the machinery and equipment upon the property for a period of two years without charge. At the same meeting Mr. W. L. McComas offered $1,550 for the real estate at Burkesville and Tomkinsville, subject to the condition of the storage of the machinery. Mr. Mayes was

the owner of other similar plants and he expected to find some use for the machinery in connection with the other plants. Mr. McComas was interested in a garage located adjacent to the real property at Burkesville and he expected that the real estate with its improvements would be useful in the operation of the garage. Each of the two stockholders attending this meeting was at liberty to make a higher offer than that offered by the other, but at the time of the meeting it had been agreed that no further offers would be made. The liquidation committee thereupon accepted the offers and authorized the sale of the properties to these stockholders by the company.

25. Certain other remaining assets of the company were also disposed of by the liquidation committee as follows: Mr. McComas and Mr. Mayes each reimbursed the company for premium payments on life insurance policies
92 which were transferred to them. The accounts receivable in the amount of $4,850.50 were bought by Mr. McComas and Mr. Mayes for $4,850.50. $37,000 of first-mortgage notes of the Horse Cave Water Company were endorsed and delivered to W. L. McComas and E. S. Mayes *pro rata* in proportion to their ownership of the capital stock of the corporation. The sales authorized by the committee produced the sum of $28,685, and this sum was directed to be distributed in cash, one-half to W. L. McComas and one-half to E. S. Mayes.

26. The machinery and equipment sold to Mr. Mayes by direction of the liquidation committee were as follows:

1 1-ton 1937 Ford truck.

1 60 H. P.
1 120 H. P.
1 200 H. P.
} Fairbanks-Morse Diesel engine, directly connected to generator.

1 5-ton York Ice Plant, together with switchboard equipment and engine auxiliaries.

The 60- and 120-horsepower engines were comparatively new in 1929 when the plant in which they were installed was acquired by or for the plaintiff company. The 200-horsepower engine was acquired second-hand in 1934 or 1935, it having previously been installed in 1920. This equipment was in regular use by the company up to August 1940.

The appraisal made in 1937 listed this equipment, exclusive of the Ford truck, as having a value of $34,710.21 as a part of a going concern. The depreciated book value was $8,164.99.

In 1941 or 1942 Mr. Mayes sold the three engines and the York Ice Plant for $8,300. The Ford truck was also sold but the selling price is not disclosed.

27. The real property sold to Mr. McComas by order of the liquidation committee consisted of the following: in Burkesville, a lot adjoining the Burkesville Garage upon which the ice plant and generating plant were located, together with the improvements; in Tomkinsville, a tract of land containing about three-eights of an acre, together with a power plant and other improvements. About two years later he sold the real estate in Tomkinsville for $400.00. He still owns the real property in Burkesville. The real property was shown in the appraisal of 1937 as having cost $7,750 and as having a value of that
93 amount as a part of a going concern. Its depreciated book value was $2,840.12. For state tax purposes, the real property, including the generating and ice plants, were appraised at $22,500 as a part of a going concern.

The value of the real property was impaired to some extent by the right to have the machinery stored without charge for two years, and also by the fact that after removal of the machinery it would be necessary to remove the concrete engine foundation before the buildings could be fully used.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff is entitled to recover of and from the United States the sum of nineteen thousand six hundred ninety-eight dollars and eighteen cents ($19,698.18), plus interest according to law on seventeen thousand fifty-four dollars and seventy cents ($17,054.70) from October 15, 1943, and interest on two thousand six hundred forty-three dollars and forty-eight cents ($2,643.48) from December 16, 1943.

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

W. L. McComas and E. S. Mayes and their families owned all of the stock of the Cumberland Public Service Company, an electric light company, located in Kentucky. On June 10, 1940, McComas and Mayes entered into an agreement with the Tri-County Electric Membership Corporation to sell to it certain of the physical properties of the plaintiff com-

pany, the Cumberland Public Service Company, as soon as this company was liquidated and the properties were received by them as a liquidating dividend. The sale was later consummated.

Subsequently the plaintiff company filed its income tax return for 1940 reporting a loss on the year's operation and no tax liability. It disclosed the sale of some of its properties to the Tri-County Electric Membership Corporation, but stated that this sale had been made by the
94 stockholders, and not by the corporation. On an audit of this return the Commissioner of Internal Revenue determined that the property had been sold by the corporation, at a profit, and a tax on this profit was assessed against the corporation.

The return of the plaintiff company also claimed a loss on the sale of certain real estate of the company to one of the stockholders and a loss on the sale of machinery and equipment to another stockholder. These claimed losses were disallowed by the Commissioner. A total deficiency in tax and interest of $19,698.18 was assessed against the company. This deficiency was paid and a claim for refund was duly filed. Upon its disallowance this suit was brought.

The first issue presented is whether or not the assets sold to Tri-County Electric Membership Corporation were sold by the corporation or whether the sale was made by the stockholders.

It is clear from the testimony that from the beginning of negotiations for the purchase of the plaintiff company's assets the stockholders of the plaintiff were desirous of selling their stock in the plaintiff company, instead of causing the plaintiff company to sell the physical properties desired by Tri-County Electric Membership Corporation (referred to hereafter as Tri-County). Tri-County, however, did not desire all of the assets of the plaintiff company, and the stockholders thereupon agreed to reduce the price asked for their stock from $156,000 to $115,000, with the understanding that plaintiff company in the meantime should dispose of the assets which Tri-County did not want.

The original conference between representatives of Tri-County and the stockholders of the plaintiff company was at Murfreesboro, Tennessee, on February 16, 1940. There was present at this meeting a representative of the Rural Electrification Administration, hereinafter referred to as REA, which Administration was considering advancing to Tri-County the money for the purchase of these properties. This representative expressed doubt as to whether or not

the REA could lawfully advance money to Tri-County for the purchase of the stock of the plaintiff corporation, but no final determination of this question was had until May 15, 1940, at a conference in Washington between the representatives of the REA and an attorney who represented both the stockholders of the plaintiff company and the plaintiff company itself. At this meeting this attorney was definitely advised that the REA could not advance money for the purchase of the stock of the plaintiff company.

The REA then advised this attorney that it was willing to advance to Tri-County the sum of $104,000 for the purchase of the physical properties desired. This attorney communicated this offer to the stockholders of the plaintiff company, who then directed the attorney to write the REA in part as follows:

> Upon my return from Washington I reported our conversation to Messrs. McComas and Mayes, who felt that prior to making a commitment they should seek to ascertain what the taxes would run. We immediately employed a certified public accountant who is at Burkesville today getting certain information from the books and we are exploring two or three methods of handling the matter with possible taxes involved in each method. It will probably be the end of the week before we are able to say with any degree of assurance what the taxes will be, and until that time I am afraid my clients will be unable to make up their minds.

This accountant made computations of what the taxes would be if the corporation should sell the physical properties to Tri-County; what they would be if the stockholders sold their stock and what they would be if the corporation dissolved and distributed its assets to the stockholders and then the stockholders made the sale of the desired properties to Tri-County. After these computations had been made it was determined that the least tax liability would be incurred by dissolving the corporation, distributing the assets to the stockholders, and letting the stockholders make the sale of the desired properties.

Thereupon, the stockholders of the plaintiff company determined to accept the offer and entered into a contract with Tri-County, agreeing to transfer to it certain properties upon receipt of them through liquidation of the plaintiff company. Later, the company was liquidated, its assets were distributed to its stockholders, and the stockholders made the sale to Tri-County of the properties desired.

It is evident that the transaction was handled in the way it was handled for the purpose of incurring the least tax liability. The purpose of the stockholders in the be-
96 ginning, in undertaking to sell their stock in the plaintiff company rather than to cause this company to sell the physical assets, was to reduce tax liability as much as possible, and this purpose continued throughout the negotiations and determined the way the transaction was finally handled. There was never at any time an intention on the part of the plaintiff company or of its stockholders to cause this company to make the sale of its physical properties, because it was thought from the beginning that this would result in the greatest tax liability. Under such facts we do not think it is tenable to say that, although the sale in form was made by the stockholders, it was in fact made by the corporation.

Although the avowed purpose of the stockholders of the plaintiff company was to reduce taxes, nevertheless, every step they took in the matter was entirely legal; there is not a suspicion of fraud or evasion involved; it was an open and above-board effort to carry out the transaction in the way that would result in the least taxes. This they had the undoubted right to do.

In *Gregory* v. *Helvering*, 293 U. S. 465, 469, the Supreme Court said:

> The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.

The court cited as authority for this statement *United States* v. *Isham*, 17 Wall. 496, 506; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395-396; and *Jones* v. *Helvering*, 63 App. D. C. 204; 71 F. (2d) 214, 217. In the *Isham* case the Supreme Court said:

> * * * To this objection there are two answers:
>
> 1st. That if the devise is carried out by the means of legal forms, it is subject to no legal censure. To illustrate. The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks in payment of his debt to the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations

97 deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment, and thus to avoid the tax. The device we are considering is of the same nature.

The Government contends that this well established and sensible doctrine has been overturned by the Supreme Court in *Commissioner* v. *Court Holding Co.*, 324 U. S. 331. We cannot impute to the Supreme Court an intention to so hold. In the *Court Holding Company* case the corporation had initiated the negotiations for the sale, but when it was realized that this would result in more taxes than from a sale by the stockholders, after a liquidating dividend, the sale by the corporation was ostensibly dropped (as found by the Tax Court) and the sale was nominally made by the stockholders. The Court held that the corporation had actually made the sale. But the Court did not hold that the stockholders could not have initiated negotiations for the sale in the first instance, and could not have carried it through themselves without resulting liability on the corporation for any profit derived from the sale. The Court was of the opinion that the corporation, having initiated the sale, in effect consummated it. Its decision was based expressly on the finding of the Tax Court that "despite the declaration of a 'liquidating dividend' followed by the transfers of legal title, *the corporation had not abandoned the sales negotiations*; that these were mere formalities *designed 'to make the transaction appear to be other than what it was'* in order to avoid tax liability." [Italics ours.] It called attention to the fact that the Circuit Court of Appeals had held, instead, that "the corporation had 'called off' the sale," but held that "there was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the courts." It said:

> On the basis of these findings, the Tax Court was justified in attributing the gain from the sale to respondent corporation.

These are not the facts here. From the very beginning it was the stockholders who were negotiating for the sale of their stock. There was never any intention that the corporation should make the sale, and even when the
98 REA determined that they could not furnish the money to Tri-County to buy the stock, the stockholders still persisted in their purpose of making the sale

themselves, and for this reason they caused a dissolution of the plaintiff company, and the stockholders then in fact made the sale of the physical properties received by them as a liquidating dividend.

We are of the opinion that the principle first laid down by the Supreme Court in the *Isham* case, 17 Wall. 496, and reiterated in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, and in *Gregory* v. *Helvering*, 293 U. S. 465, is still the law. If this principle be applied to the facts of this case, we think it is altogether untenable to say that, although the sale in this case was ostensibly made by the stockholders, it was in fact made by the corporation.

The view we have taken is the same as that taken by the 5th Circuit Court of Appeals in the case of *Howell Turpentine Co.* v. *Commissioner*, 162 F. (2d) 319, in which opinions were written by Judge Sibley, and by Judges Hutcheson and Lee, all of whom expressed the opinion that although the avowed purpose is to reduce taxation, nevertheless the stockholders of a corporation may validly contract to dissolve the corporation and to sell the physical assets themselves. See also *Commissioner* v. *Falcon Co.*, 127 F. (2d) 277; *United States* v. *Cummins Distilleries Corp.*, 166 F. (2d) 17; *Acampo Winery & Distilleries, Inc.* v. *Commissioner*, 7 T. C. 629.

It is unnecessary for us to determine whether or not the plaintiff is entitled to the loss they claim upon the sale to McComas and Mayes of its remaining machinery and its real estate, since, if the sale of its transmission lines to Tri-County was not made by the corporation, it had no taxable income. Since we are of the opinion that it was not made by the plaintiff company, but by the stockholders, we do not consider whether or not the company is entitled to the deduction claimed for these losses.

Judgment will be entered for the plaintiff in the sum of $19,698.18, plus interest, according to law, on $17,054.70 from October 15, 1943, and interest on $2,643.48 from December 16, 1943.

HOWELL, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

99 *Dissenting Opinion.*

MADDEN, *Judge*, dissenting:

I am unable to agree with the court's decision. The object of the parties here, as in the case of *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, was to transfer certain tangible property from the plaintiff corporation, its owner, to the

Tri-County Electric Membership Corporation. In the *Court Holding Company* case, the tax consequences of a direct sale were not at first known to the selling corporation, hence it proceeded, up to a point, with the negotiation, but, upon learning that taxes would be reduced by first dissolving the corporation and distributing the assets to the stockholders, it followed that course. The court held that the fact that the transfer was made by two steps instead of one, did not, in the circumstances, reduce the tax liability. The instant case involves the same two steps, taken for the same reason. The factual difference that here the plaintiff corporation knew from the outset what the tax consequences of a direct sale would be, instead of, as in *Court Holding*, learning them later, cannot be important. The corporation had not, in that case, proceeded to the point of making a binding agreement of sale before it discovered the tax problem and changed the form of the transaction. Hence it could be said in that case, as well as in our case, that perhaps the corporation, or the stockholders who controlled it, would not have been willing to sell at all, unless they could keep the taxes which would result from the sale down to the level at which the form of the transaction was directed.

My views as to how this and similar questions of taxation should be treated are expressed in the case of *Benjamin Guinness* v. *United States*, 109 C. Cls. 84, 106, certiorari denied, 334 U. S. 819.

I do not discuss the plaintiff's claim for losses upon the sale of its remaining machinery and real estate, in view of the court's decision that there were no profits against which these losses could be set off.

101 *Judgment of the Court—May 2, 1949*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is Therefore Adjudged and Ordered that plaintiff is entitled to recover of and from the United States the sum of nineteen thousand six hundred ninety-eight dollars and eighteen cents ($19,698.18), plus interest according to law on seventeen thousand fifty-four dollars and seventy cents ($17,054.70) from October 15, 1943, and interest on two thousand six hundred forty-three dollars and forty-eight cents ($2,643.48) from December 16, 1943.

103 Clerk's Certificate to foregoing transcript omitted in printing.

U. S. GOVERNMENT PRINTING OFFICE 849027 NO. 4——1949

Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1949

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1949

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 214

UNITED STATES OF AMERICA, PETITIONER

v.

CUMBERLAND PUBLIC SERVICE COMPANY, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in this case.

OPINION BELOW

The special findings of fact and opinion of the Court of Claims (R. 55-76), together with the dissenting opinion of Judge Madden (R. 76-77), are reported at 83 F. Supp. 843.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949 (R. 77). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255(1).

QUESTION PRESENTED

After it was agreed that the taxpayer corporation's property should be sold to a designated purchaser, and as part of a pre-conceived plan to avoid the imposition of the tax which would be incurred if the taxpayer sold its property directly to the purchaser, the stockholders caused the taxpayer's property to be distributed to them in a liquidation distribution, and, thereupon, they transferred the property to the purchaser.

The question is whether, contrary to the view of the Court of Claims, such a liquidation distribution can be utilized to relieve the corporation from tax where it serves no other purpose than to accomplish a circuitous routing of title from the corporation, through its stockholders, to the predetermined purchaser, all in accordance with a pre-conceived plan.

STATUTE AND REGULATIONS INVOLVED

INTERNAL REVENUE CODE:

SEC. 22. GROSS INCOME:

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the

transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

TREASURY REGULATIONS 103, promulgated under the Internal Revenue Code:

SEC. 19.22(a)-19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

SEC. 19.22(a)-21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or

complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 19.44-5. (See further section 19.52-2.)

STATEMENT

The taxpayer is a corporation which was engaged in the business of generating electricity and distributing it to retail consumers. All its capital stock was originally owned by three individuals, W. L. McComas, E. S. Mayes, and W. F. Grisby. McComas later transferred some of his shares in trust for certain members of his family, naming himself as trustee. Mayes acquired Grisby's shares and transferred some of his stock to certain members of his family. (R. 56.)

Tri-County Electric Membership Corporation, which will be referred to as Tri-County, was a cooperative corporation which was organized in 1936 and obtained electrical energy from the Tennessee Valley Authority for distribution. Part of its territory included the area served by the taxpayer. From the time of Tri-County's organization in 1936, it was its plan to acquire the taxpayer's transmission and distribution facilities, and it became evident to the taxpayer's officers that the taxpayer would either have to acquire power from the Tennessee Valley Authority or sell its properties to Tri-County. Negotiations to that end continued more or less regularly thereafter. In October, 1939, McComas conferred with a representative of the Tennessee Valley Authority to

ascertain whether the taxpayer could acquire power from the Authority, or, if not, whether a sale of its properties could be effected. The asking price for all the property was $156,000. Several months later, the representatives of the taxpayer met with representatives of the Rural Electrification Administration, called REA, to discuss the possibility of Tri-County's acquiring all the facilities of the taxpayer as a going concern, and offered to sell all the stock in the corporation at the price of $156,000. It developed, however, that there were certain facilities belonging to the taxpayer which Tri-County did not wish to acquire and also that a sale of the stockholders' stock would not be possible because REA would not finance such a purchase but would only finance Tri-County's acquisition of certain of the taxpayer's properties (R. 57-61.)

After an offer of $104,000 had been made for the designated portion of the taxpayer's properties which Tri-County wished to acquire, the taxpayer's officers employed a firm of certified public accountants to canvass the various tax consequences which would follow if the stockholders sold their stock, or if the taxpayer sold the properties in question, or if the taxpayer dissolved and distributed its assets to the stockholders followed by a subsequent sale of the properties by the stockholders. (R. 61.)

Subsequently, taxpayer's counsel wrote a letter to a representative of the REA, stating that

taxpayer's directors had determined that the taxpayer "will not accept an offer of $104,000.00 for the transmission and distribution lines;" the letter went on to say that McComas and Mayes "individually" would acquire the properties and would enter into a contract with Tri-County for their sale under certain prescribed conditions (R. 62-63.)

A formal contract was entered into between Tri-County and McComas and Mayes for the sale of the property to be acquired by the vendors from the corporation. The contract was dated June 10, 1940, but the signatures were actually affixed at a later date. (R. 64-65.)

On August 9, 1940, all the other stock of the taxpayer (except for qualifying shares) was transferred to McComas and Mayes who were to act as agents for the other shareholders in receiving their distributable portion of the taxpayer's assets. On August 13, 1940, at a special meeting of the stockholders, it was resolved that the taxpayer should be dissolved and, at a special meeting of the board of directors on the same day, McComas and Mayes were appointed as a committee to liquidate the corporation. (R. 65-67.)

On September 27, 1940, the Public Service Commission of Kentucky approved an application filed jointly by the taxpayer, Tri-County, and McComas and Mayes which stated that the taxpayer desired to dissolve, that its transmission and distribution system would be conveyed to McComas

and Mayes as a liquidation distribution, and that they would sell the property to Tri-County. (R. 67-68.)

On October 22, 1940, the taxpayer conveyed the property in question to McComas and Mayes who, on October 24, 1940, conveyed it to Tri-County. (R. 68.)

The Commissioner determined deficiencies in the taxpayer's income, declared value, excess profits and defense taxes for the calendar year 1940 resulting, in part, from his determination that the property in question had been sold by the corporation and that the resulting gains should have been included in its taxable income. After the asserted deficiencies had been paid, the taxpayer filed a timely claim for refund with the Commissioner of Internal Revenue. After rejection of the claim, proceedings were instituted in the Court of Claims to recover the refund. (R. 57-58.) The Court of Claims entered judgment for the taxpayer. (R. 77.)

REASONS FOR GRANTING THE WRIT

This case presents an increasingly familiar situation which frequently arises where the property of a closely held corporation is desired to be sold, and where the purchaser is unwilling to acquire the stock of the corporation, but is interested only in purchasing some or all of the corporation's property. If the corporation were to make the sale of its property directly to the pur-

chaser, it would be taxed on its gains and the stockholders might also be charged with taxable income whenever the proceeds are distributed by the corporation to them.[1] This, of course, is the normal incidence of the fact that Congress has seen fit to tax the corporation and its stockholders as separate entities. *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422. After an agreement or understanding has been reached with a purchaser that the property will be sold, it has become the fashion to attempt to avoid the imposition of the tax on the corporation by going through the motions of having the corporation make a liquidation distribution of the property in question to the stockholders, who then sell the property as though they were the individual owners and vendors. A liquidation distribution to the stockholders is selected as one of the formalisms because, and only because, a corporation is not taxed with gain when there is a distribution of assets in complete or partial liquidation of the corporation,[2] and because the stockholders hope thereby

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[1] If the proceeds are distributed as an ordinary dividend, and if the corporation possesses earnings and profits to qualify the distribution as a dividend, the stockholder will be taxed with ordinary income. Section 115 (a), Internal Revenue Code. If the proceeds are distributed in liquidation, they may constitute capital gain to the shareholder to the extent that the payments received exceed his basis. Section 115 (c), Internal Revenue Code (26 U.S.C. 1946 ed., Sec. 115).

[2] See Section 19.22(a)-21, Treasury Regulations 103, *supra.* Similar provisions have appeared in all Regulations ever since Article 547, Treasury Regulations 45, promulgated under the Revenue Act of 1918.

to avoid the appearance of a transaction which would be taxable to the corporation, as would plainly be true in the case of a direct sale by the corporation made prior to or in the course of liquidation. The success of this tax avoidance scheme ultimately depends upon whether it was the purpose of the Regulations to relieve a corporation from tax where a liquidation distribution takes place, not to make the stockholders the owners of the property free to do with it as they please, but only to enable them to convey title to a third person in accordance with an agreement or understanding reached while the corporation still owned the property. It is the Government's position that in these circumstances the corporation has not made a non-taxable transfer of its property, and that it cannot be relieved from tax on the gains which inhered in its property, and which were realized upon sale to the ultimate purchaser.

1. The decision below is wrong. The Court of Claims, quite erroneously, assumed that the ultimate question depends upon who appears to be the formal vendor of the property. Because the stockholders and officers, in a deliberate attempt to avoid the imposition of the tax on the corporation, purported to act in their individual capacities in conducting some of the negotiations for the sale of the property while it was still owned by the corporation, and agreed, in advance, in their individual capacities, to sell the property after causing the corporation to distribute it by way of liqui-

dation, the court concluded that no gain could be attributed to the corporation. Inherent in this conclusion is the unexpressed assumption that the corporation made a genuine liquidation distribution which would relieve it from tax under Section 19.22(a)-21, Treasury Regulations 103, *supra*. This assumption and this conclusion are erroneous.

The provisions of the Regulations which relieve the corporation from tax when it makes a liquidation distribution to its stockholders, as is true of other provisions of the statute describing non-taxable situations, comprehend genuine transfers and not a series of formal steps designed to cloak what is in reality an altogether different transaction. Such has been the unvarying decisions of this Court. *Gregory* v. *Helvering*, 293 U.S. 465; *Minnesota Tea Co.* v. *Helvering*, 302 U.S. 609; *Griffiths* v. *Commissioner*, 308 U.S. 355; *Commissioner* v. *Court Holding Co.*, 324 U.S. 331. A genuine liquidation distribution which will relieve the corporation from tax can never occur when the stockholders are not intended to acquire unqualified ownership of the property, free to do with it thereafter as they please. It does not occur where, as here, the agreement to sell the property is reached when the corporation is the owner and the only entity capable of making the sale, and where the liquidation distribution can and does serve no legitimate business purpose, but for tax reasons is designed to make the stockholders appear as vendors following a transitory "ownership." *Kauf-*

mann v. *Commissioner* (C.A. 3d), decided April 26, 1949 (1949 C.C.H., par. 9268).

We contend that in the circumstances of this case no genuine, tax-free liquidation has occurred, and that the stockholders are mere conduits for the passage of title out of the corporation and into the predetermined purchaser. The same situation was presented in the *Court Holding Co.* case, *supra,* and when this Court said (p. 334) "A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title," it was applying the teaching of the above cited cases, particularly the *Minnesota Tea Co.* case, where the stockholders were also used as conduits between the corporation and its creditors to give the outward appearance of compliance with the non-taxable provisions which were there involved.

In the present case, negotiations looking toward the sale either of the stockholders' stock, or of the corporation's property, were started several years prior to the ultimate sale of the property. When it became clear that the stockholders' stock could not be sold and that the purchaser desired to acquire only part of the corporation's property, and when the negotiations were about to reach fruition, the taxpayer's officers and directors caused a study to be made of the possible tax consequences which would attend either a direct sale by the corporation, or a sale by the stockholders after acquiring the property through a liquidation distribu-

tion from the corporation. It was only thereafter that it was decided that the corporation would not accept any offer for its property, and that the stockholders should convey it after receiving it from the corporation.

We submit that the very matters on which the court below made the case turn demonstrate that this is a situation where the only permissible conclusion is that the gains are attributable and taxable to the corporation. Even if we accept the factual assumption of the court below that the corporation had not been a formal party to the negotiations and that the stockholders had purported to act for themselves, the very fact that the stockholders had agreed to sell the property to the purchaser at a time when it was still owned by the corporation (all in an admitted design to avoid the tax on the corporation) shows conclusively that the liquidation distribution was only employed to permit them to transfer title to the purchaser in accordance with an existing agreement. As the dissenting judge below pointed out, the liquidation distribution was a meaningless step, except as it was used in an integrated plan to accomplish, somewhat deviously, the desired end, namely, the transfer of the corporate property out of the corporation and into the ultimate purchaser. Such a liquidation distribution cannot disguise the fact that the corporation is the only vendor. Indeed, when the property of a corporation is sold, even in the course of liquidation, the

gains are taxable to it. Treasury Regulations 103, Section 19.22(a)-21, *supra*.

To hold, as did the court below, that a result contrary to *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, is required in this case because, as it viewed the case, here the stockholders were cognizant of the tax consequences at the outset and were able to prepare their ritual before any part of the ceremony had commenced, rather than in the middle, as took place in *Court Holding Co.*, would make the tax results turn merely on how assiduously the formalisms are fully observed. Such a conclusion would be contrary to every basic principle ever pronounced by this Court. It is the corporation's property which is being sold and the corporation must be taxed with the gain (cf. *United States* v. *Joliet & Chicago R. Co.*, 315 U.S. 44); the stockholders and officers act for the corporation when they deal with its property whether they say so or not (*Kaufmann* v. *Commissioner* (C.A. 3d), decided April 26, 1949 (1949 C.C.H., par. 9268)). The corporation cannot avoid the tax by purporting to utilize the device of a tax-free liquidation distribution to its stockholders where that is only a means of accomplishing a sale of its property. *Kaufmann* v. *Commissioner, supra.*

2. An issue of considerable importance in the administration of the income tax law is raised by the present case. In *Commissioner* v. *Court Hold-*

ing Co., 324 U.S. 331, where the identical tax problem was presented, this Court held that (p. 334) "the Tax Court was justified in attributing the gain from the sale" to the corporation, and that the Court of Appeals had erred in arriving at the contrary conclusion. In so doing, the Court reiterated the principle that the true nature of the transaction cannot be disguised by mere formalisms designed to alter the tax liabilities imposed by Congress, that the various steps taken by the parties are not to be regarded as isolated transactions but must be viewed as a whole, and that a sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit for passing title.

Ignoring these basic principles which underlie the *Court Holding Co.* decision, the court below has attempted to limit that case to its precise factual circumstances and has ruled that the opposite result is required if the negotiations are commenced by the stockholders when they purport to act for themselves instead of on behalf of the corporation. A similar decision was rendered in *Howell Turpentine Co.* v. *Commissioner*, 162 F. 2d 319 (C.A. 5th), where the Tax Court was reversed for having followed the *Court Holding Co.* decision. See also *Steubenville Bridge Co.* v. *Commissioner*, 11 T.C. 789, as an instance of where the Tax Court followed the wrong principles. Contra: *Kaufmann* v. *Commissioner* (C.A. 3d), decided April 26, 1949 (1949 C.C.H., par. 9268);

Wichita Term. El. Co. v. *Commissioner*, 162 F. 2d 513 (C.A. 10th); *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. 2d 321 (C.A. 2d), certiorari denied, 329 U.S. 774.

These divergent views respecting the principles of the *Court Holding Co.* case which are to be followed by the lower courts make it a matter of prime importance that this Court should make it plain that *Court Holding Co.* was not a factual sport, but a decision resting on solid principles. The lower courts should be disabused of any notion that whether the stockholders or officers purport to act personally, or as representatives of the corporation, is a crucial matter on which the tax consequences can turn. It should be made plain that the *Court Holding Co.* decision did not invite the use of liquidation distributions as devices for tax avoidance when part of a preconceived plan to transfer the corporate property to a third party, and did not encourage an added formalism of pretending to lock the corporation's representatives out of the negotiation room in one capacity while admitting them in another.

3. As has already been made clear, the decision below conflicts in principle with *Commissioner* v. *Court Holding Co.*, 324 U.S. 331. The decision below also conflicts with *Gregory* v. *Helvering*, 293 U.S. 465; *Minnesota Tea Co.* v. *Helvering*, 302 U.S. 609; and *Griffiths* v. *Commissioner*, 308 U.S. 355, by holding that the corporation made a tax-

free liquidation distribution, when the distribution served no bona fide business purpose and when it was utilized only for the purpose of permitting the stockholders to transfer the corporation's property in order that it would appear, for tax purposes, that they and not the corporation were the vendors. The decision below is similarly opposed by the decisions of other courts of appeals rendered subsequently to the *Court Holding Co.* decision. *Wichita Term. El. Co.* v. *Commissioner*, 162 F. 2d 513 (C.A. 10th); *Kaufmann* v. *Commissioner* (C.A. 3d), decided April 26, 1949 (1949 C.C.H., par. 9268); *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. 2d 321 (C.A. 2d), certiorari denied, 329 U.S. 774.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1949

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 214

UNITED STATES OF AMERICA, PETITIONER

v.

CUMBERLAND PUBLIC SERVICE COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The special findings of fact and opinion of the Court of Claims (R. 55-76), together with the dissenting opinion of Judge Madden (R. 76-77), are reported at 83 F. Supp. 843.

JURISDICTION

The judgment of the Court of Claims was entered on May 2, 1949 (R. 77). A petition for a writ of certiorari was filed on July 28, 1949, and was

granted on October 17, 1949 (R. 78). The jurisdiction of this Court rests on 28 U. S. C., Section 1255 (1).

QUESTION PRESENTED

After it was agreed that the taxpayer corporation's property should be sold to a designated purchaser, and as part of a preconceived plan to avoid the imposition of the tax which would be incurred if the taxpayer sold its property directly to the purchaser, the stockholders caused the taxpayer's property to be distributed to them in a liquidation distribution, and, thereupon, they transferred the property to the purchaser.

The question is whether such a liquidation distribution can be utilized to relieve the corporation from tax where it serves no other purpose than to accomplish a circuitous routing of title from the corporation, through its stockholders, to the predetermined purchaser, all in accordance with a preconceived plan.

STATUTE AND REGULATIONS INVOLVED

INTERNAL REVENUE CODE:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal,

growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22(a)-19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

Sec. 19.22(a)-21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the

corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 19.44-5. (See further section 19.52-2.)

STATEMENT

The following is a summary of the special findings of fact made by the Court of Claims (R. 56-69):

The taxpayer, which was incorporated in 1929, was engaged in the business of generating electricity and distributing it to retail consumers. During the taxable year, all of its capital stock was owned by W. L. McComas and E. S. Mayes, and by members of their immediate families. McComas held certain of these shares in trust for his children. (R. 56.)

Tri-County Electric Membership Corporation, which will be referred to as Tri-County, is a cooperative corporation, organized in 1936, which obtained electrical energy from the Tennessee Valley Authority for distribution. Part of its territory included the area served by the taxpayer. From the time of Tri-County's organization in 1936, it was its plan to acquire the taxpayer's transmission and distribution facilities. Soon after Tri-County began operating, it became evident to

the taxpayer's officers that the taxpayer would have to acquire power from the Tennessee Valley Authority or sell its property to Tri-County, and negotiations to that end continued more or less regularly thereafter. In October, 1939, McComas conferred with a representative of the Tennessee Valley Authority to ascertain whether power could be secured from the Authority or, if not, whether a sale of its properties could be effected. The asking price for all the property was $156,000. (R. 58.) In February, 1940, representatives of the taxpayer met with representatives of the Rural Electrification Administration (called REA), and for several days discussed the possibility of the acquisition by Tri-County of the transmission and distribution lines of the taxpayer. The taxpayer's officers desired to sell the entire plant as a going concern and offered to sell all the stock of the taxpayer to Tri-County for the sum of $156,000. It developed, however, that Tri-County was not interested in buying all of the properties owned by the taxpayer, and desired to purchase only its transmission and distribution lines. Thereupon, the taxpayer's officers offered to sell the stock for $115,000, with the understanding that the other property would be disposed of prior to the sale. The difference between the original price of $156,000 and the reduced price of $115,000 represented the approximate value of the other properties which Tri-County did not desire. The representatives of REA expressed doubts

whether it could finance a purchase by Tri-County of the stock. (R. 59-60.)

It later was made clear that REA could not finance Tri-County's acquisition of the stock. REA offered, however, to finance the acquisition of the desired physical properties at a price of $104,000. (R. 60-61.)

After learning REA's views, the taxpayer's officers employed a firm of certified public accountants to prepare computations of the taxes which would be incurred in various ways of making the sale of the properties desired by Tri-County, that is, by a sale of these properties by the taxpayer, by a sale of the stock by the stockholders, or by dissolution of the company and distribution of the assets to the stockholders who would make the sale. After receiving the computations, taxpayer's officers and legal counsel held a conference for the purpose of considering the tax consequences. As a result of the conference, taxpayer's counsel wrote a letter to a representative of the REA stating that the taxpayer's directors had determined that the taxpayer "will not accept an offer of $104,000.00 for the transmission and distribution lines;" the letter further went on to say that McComas and Mayes "individually" would acquire the properties and would enter into a contract with Tri-County for the sale under certain prescribed conditions. (R. 61-63.)

This offer was accepted by Tri-County, and by a written instrument dated June 10, 1940, McComas

and Mayes agreed to sell, and Tri-County agreed to purchase, the property which was to be acquired by McComas and Mayes from the taxpayer. (R. 64-65.) On August 9, 1940, all the other stock of the taxpayer (except for qualifying shares) was transmitted to McComas and Mayes who were to act as agents for the other shareholders in receiving their distributable portion of the taxpayer's assets. At a special stockholders' meeting, held on August 13, 1940, it was resolved that the corporation should be dissolved and that steps should be taken to liquidate its assets and to distribute to the stockholders, in cash or in kind, the assets not required to pay outstanding debts. On the same day, the board of directors appointed McComas and Mayes as a committee for liquidation, empowered to realize on the assets of the corporation for the payment of its debts and to distribute any remaining assets to the stockholders. (R. 65-67.)

On September 4, 1940, the taxpayer, McComas and Mayes, and Tri-County, filed an application with the Public Service Commission of Kentucky in which it was stated that the taxpayer desired to dissolve, that its transmission and distribution system would be conveyed to McComas and Mayes as a liquidating dividend, and that they desired to sell, and Tri-County desired to purchase, the property. It was also stated that McComas and Mayes would continue operations until the transfer of the property to Tri-County could be completed. The application requested approval of

the proposed dissolution, operation, sale and purchase of the utility properties. The application was granted on September 27, 1940. (R. 67-68.)

On October 22, 1940, the taxpayer, acting through McComas, its president, executed a deed and bill of sale to McComas and Mayes of the properties which Tri-County desired to purchase. By instrument dated October 24, 1940, McComas and Mayes, joined by their wives, conveyed the properties to Tri-County for a consideration of $104,000, with appropriate adjustments to the effective date of sale. (R. 68-69.)

The Commissioner determined deficiencies in the taxpayer's income, declared value, excess profits and defense taxes for the calendar year 1940, resulting, in part, from his determination that the property in question had been sold by the corporation and that the resulting gains should have been included in its taxable income. After the asserted deficiencies had been paid, the taxpayer filed a timely claim for refund with the Commissioner of Internal Revenue. The claim was rejected and the taxpayer instituted proceedings in the Court of Claims for refund. (R. 57-58.) The Court of Claims entered judgment for the taxpayer. (R. 77.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred in holding that the taxpayer did not realize taxable gain when its prop-

erty was sold, and in holding that the sale in question was not to be imputed to the taxpayer.

SUMMARY OF ARGUMENT

Where the stockholders of a closely held corporation enter into an agreement to sell the corporation's property to a purchaser, and where the corporation distributes the property to the stockholders in a liquidation distribution for the sole purpose of enabling them to make the sale, the sale and any attendant gains must be imputed to the corporation.

A corporation will not be taxed with gain if it distributes its property in kind to its stockholders in a genuine liquidation distribution. In the present case, however, the liquidation distribution was not intended to make the stockholders the owners of the property. It was used only as a form to cloak a sale of the corporation's property, and was a meaningless step whereby there was a circuitous routing of title to the ultimate purchaser, the stockholders acting as pure conduits. Such a liquidation distribution is not a *bona fide* transaction which will relieve the corporation from tax. This Court so held in *Commissioner* v. *Court Holding Co.*, 324 U. S. 331.

The Court of Claims was wrong in attempting to distinguish the *Court Holding Co.* case on the ground that there the sale negotiations were initiated by the corporation, while here they were commenced by the stockholders. That case did not

turn on the formality of who purports to conduct negotiations. It is bottomed on the proposition that where the liquidation distribution is only an artificial device which serves no legitimate purpose, it cannot alter the tax consequences which would have followed if the corporation had made a direct sale of its property.

ARGUMENT

A Corporation Is Taxable With Gain Where Its Property Is Sold to a Purchaser, Notwithstanding That the Property Is First Distributed to the Stockholders Who Consummate the Sale in Accordance With a Prearranged Plan

A. *The liquidation distribution here was not a genuine transaction which would relieve the corporation from tax. It was a pure formality by which the stockholders acted as conduits to pass title to the purchaser of the corporation's property.*

The issue here is whether a corporation can escape being taxed on corporate gains where its property is sold to a third party, the sale taking place only after the property has first been routed to the stockholders under the guise of a liquidation distribution, and where this is part of a preconceived plan to achieve a sale of the property to the intended purchaser, and yet to avoid the appearance of a direct, taxable sale by the corporation.

The Court of Claims was wrong in holding that, where such a scheme is executed, there can be a

successful evasion of the corporate tax merely because a liquidation distribution, which is one in form alone and is not intended to invest the stockholders with ownership of the property, has been interjected in an attempt to obscure the fact that it is the corporation's property which has been sold to the ultimate purchaser. The decision in *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, where the contrary result was reached under similar circumstances, demonstrates that the court below was in error. So, too, do the other decisions which followed *Court Holding Co.*: *Kaufmann* v. *Commissioner*, 175 F. 2d 28 (C. A. 3d); *Wichita Term. El. Co.* v. *Commissioner*, 162 F. 2d 513 (C. A. 10th); *Guinness* v. *United States*, 73 F. Supp. 119 (C. Cls.), certiorari denied, 334 U. S. 819; *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. 2d 321 (C. A. 2d), certiorari denied, 329 U. S. 774. Contra: *Howell Turpentine Co.* v. *Commissioner*, 162 F. 2d 319 (C. A. 5th).

Normally, of course, a corporation is taxable on any gains realized upon a sale or disposition of its property. A liquidation distribution to the stockholders as a step in making the ultimate sale to the predesignated purchaser has been utilized here, and in other similar situations, because the Treasury regulations have long provided that a corporation does not realize taxable gain or loss when it distributes its property in kind to its shareholders by way of a complete or partial liquidation.

By distributing the property to the stockholders, who then proceed to consummate the sale, the corporation attempts to negate the conclusion that it is the vendor, and to avoid the tax which would be imposed if it had made the sale directly. Such a liquidation distribution, however, is not the kind of a transfer which is tax-free under the Regulations, and it cannot be utilized to insulate the corporation from tax where, instead of making the stockholders the owners of the distributed assets, it is only a means of effectuating a sale of the corporate property to others.

Section 19.22(a)-21, Treasury Regulations 103, *supra*, provides:[1]

> *Gross income of corporation in liquidation.* —When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their

[1] Similar provisions have appeared in all Regulations ever since Article 547, Treasury Regulations 45, promulgated under the Revenue Act of 1918.

acquisition. But see section 44 (d) and section 19.44-5. (See further section 19.52-2.)

The last sentence of this paragraph becomes the focal point of the present controversy. In relieving the corporation from tax when it distributes its property in kind to the stockholders by way of a complete or partial liquidation, this provision of the Regulations, as is true of other provisions of the statute describing non-taxable situations, comprehends genuine transactions; it does not embrace steps which are purely formal in character, which do not have any substantive consequences, and which are utilized solely to disguise one situation so that it has the surface appearance of another. The decisions of this Court have been unvarying in this respect. *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *Gregory* v. *Helvering*, 293 U. S. 465.

The kind of *bona fide* liquidation distribution which the Regulations describe is one where the corporate assets pass to the stockholders with full and untrammelled ownership, so that the stockholders are thereafter free to deal with the property as their own. The Regulations do not apply where, as here, the liquidation distribution is part of a plan wherein the stockholders will merely act as conduits through whom title can be passed to an intended purchaser. This should be perfectly plain from the preceding portion of the quoted para-

graph which provides that the corporation is taxable, even when its property is sold in the course of dissolution by receivers or trustees who are liquidating the assets. Consistent with this provision of the Regulations, the decisions hold that where a corporation, in the course of liquidation, transfers its property to a trustee or agent who sells the assets, any gain is taxable to the corporation, regardless of whether the trustee purports to act for the stockholders or for the corporation in making the sale.[2]

The Regulations do not embody a self-defeating, internal inconsistency. Since a corporation is taxable in every other situation, regardless of the means by which its property is sold, it was not intended that it should escape the tax whenever the sale is to be made by the stockholders immediately following the receipt by them of the corporate assets in a self-styled liquidation distribution. The contrary is true. A corporation is a separate taxable entity from its stockholders; the corporate income, for tax purposes, cannot be imputed directly to the stockholders, no matter what the devices employed. *National Carbide Corp.* v. *Commissioner*, 336 U. S. 422; *Commissioner* v. *Court Holding Co.*,

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[2] *First Nat. Bank of Greeley, Colo.* v. *United States*, 86 F. 2d 938 (C.A. 10th); *Tazewell Electric Light & Power Co.* v. *Strother*, 84 F. 2d 327 (C.A. 4th); *Northwest Utilities Securities Corp.* v. *Helvering*, 67 F. 2d 619 (C.A. 8th), certiorari denied, 291 U.S. 684; *Hellebush* v. *Commissioner*, 65 F. 2d 902 (C.A. 6th); *Burnet* v. *Lexington Ice & Coal Co.*, 62 F. 2d 906 (C.A. 4th).

324 U. S. 331; *Moline Properties* v. *Commissioner*, 319 U. S. 436; *United States* v. *Joliet & Chicago R. Co.*, 315 U. S. 44; *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415. As seen above, this is as true when the corporate property is sold during dissolution as it is during the time when the corporation is actively engaged in business.

In *United States* v. *Joliet & Chicago R. Co.*, *supra*, all of the corporation's property was transferred to another company under a "perpetual lease," the transferee undertaking to make annual payments directly to the stockholders of the transferor. It was held that the payments were nevertheless taxable to the transferor corporation, the opinion stating (pp. 48-49):

> Payments made directly to shareholders by the lessee or transferee of corporate property are properly recognized as income to the corporation by reason of the relationship of a corporation to its shareholders. * * *
>
> The relationship between respondent and its shareholders is an abiding one. They obtain the dividend payments because of their status as shareholders. All questions of the rights of creditors aside, there can be no doubt that a corporation may normally distribute its assets among its stockholders. When it undertakes to do so, its act is nonetheless a corporate act though its shareholders receive new contractual rights enforceable by them alone against the transferee. That is to say, their rights to receive the proceeds on the dis-

> posal of corporate assets are strictly derivative in origin. * * * The fact that the corporation may remain in existence only to maintain a stock transfer book is immaterial. The umbilical cord between it and its shareholders has not been cut. * * *

Paraphrasing the *Joliet* case here, the fact that the transfer of the corporation's property may have given the stockholders new contractual rights, enforceable by them against the transferee, does not avoid the tax on the corporation. The stockholders receive these new rights through the corporation because they are the stockholders and, the "umbilical cord" between the corporation and its stockholders being unsevered, the income must first flow into the corporation before it can pass to the stockholders.

The formalism of a liquidation distribution cannot be successfully used to deflect the corporate gains to the stockholders. In the *Court Holding Co.* case, *supra*, as here, the corporation attempted to avoid the tax by making such a distribution to the stockholders, who, in turn, proceeded to consummate the sale as individuals; this Court, in upholding the Tax Court, which had held the corporation taxable, said (324 U. S. at 334):

> The incidence of taxation depends upon the substance of a transaction. The tax consequences which arise from gains from a sale of property are not finally to be determined solely by the means employed to transfer legal title. Rather, the transaction must be viewed as a whole, and each step, from the commence-

> ment of negotiations to the consummation of the sale, is relevant. A sale by one person cannot be transformed for tax purposes into a sale by another by using the latter as a conduit through which to pass title. To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress.

That the liquidation distribution in this case, as in *Court Holding*, was not the kind of genuine transaction which would make the stockholders the new owners of the property, and which would relieve the corporation from tax, is made clear by an analysis of the undisputed facts. Here, a written agreement to sell the corporate property to a purchaser was reached while the corporation was still the owner and the only taxable entity capable of making a sale. Here, the liquidation distribution was conceived as a method of avoiding the normal incidence of the tax, and was utilized only so that the stockholders would be momentary repositories of title, obligated to transfer the property to the predesignated purchaser immediately. The liquidation distribution was only a step in an integrated plan to accomplish, somewhat deviously, the desired end, namely, the transfer to the intended purchaser. It was a meaningless gesture, except as it sought to achieve a different tax result and to place a different complexion on what would have been the situation if the passage of title had taken a less cir-

cuitous route from the corporation to the purchaser. In view of the uniform decisions of this Court, it represented an unwarranted confidence that formalistic ritual would prevail over the substantive situation.

The stock of the taxpayer corporation was owned by two individuals, W. L. McComas and E. S. Mayes, and by members of their immediate families. (R. 56.) They had attempted to sell their stock to Tri-County Electric Membership Corporation. (R. 58-59.) Because the REA would not finance a sale of stock to Tri-County, it became plain that only the physical properties owned by the taxpayer could be the subject matter of the sale. On May 15, 1940, a representative of the REA made an offer to finance a sale of the physical properties which Tri-County desired to acquire, at a price of $104,000. (R. 61.) The taxpayer's officers thereupon employed an accounting firm to compute the tax consequences which would ensue: (a) if a sale of the properties were made by the taxpayer, or (b) if the stockholders sold their stock, or (c) if the taxpayer dissolved and distributed its assets to the stockholders who would subsequently make the sale. (R. 61-62.) After receiving the computations, the taxpayer's officers and its legal counsel held a conference to consider the various tax consequences. Thereafter, the taxpayer's counsel advised the REA that the taxpayer would not accept the offer, but that McComas and Mayes, "as individuals," would acquire

the property from the taxpayer and would agree to sell it to Tri-County for $104,000. (R. 62-64.)

This offer, which was made on May 31, 1940, was accepted by Tri-County, and was embodied in a written agreement dated June 10, 1940, wherein McComas and Mayes agreed to sell, and Tri-County agreed to purchase, certain described facilities of the taxpayer, the sale price being $104,000. (R. 64-65.)

At a special stockholders' meeting, held on August 13, 1940, it was resolved that the corporation should be dissolved and that steps should be taken to liquidate its assets and distribute to the stockholders in cash or in kind the assets not required to pay outstanding debts. On the same day, the board of directors appointed McComas and Mayes as a committee for liquidation, empowered to realize on the assets of the corporation for the payment of its debts and to distribute any remaining assets to the stockholders. (R. 65-67.)

On September 4, 1940, the taxpayer, McComas and Mayes, and Tri-County, filed an application with the Public Service Commission of Kentucky in which it was stated that the taxpayer desired to dissolve, that its transmission and distribution system would be conveyed to McComas and Mayes as a liquidating dividend, and that they desired to sell and Tri-County desired to purchase the property. It was also stated that McComas and Mayes would continue operations until the transfer to Tri-

County could be completed. It requested approval of the proposed dissolution, operation, sale and purchase of the utility properties. The application was granted on September 27, 1940. (R. 67-68.)

On October 22, 1940, the taxpayer, acting through McComas, its president, executed a deed and bill of sale to McComas and Mayes of the properties which Tri-County desired to purchase. By an instrument dated October 24, 1940, McComas and Mayes conveyed the properties to Tri-County for a consideration of $104,000. (R. 68-69.)

These matters, we submit, conclusively demonstrate that the sale must be imputed to the corporate taxpayer and that there was no *bona fide* liquidation distribution which would relieve it from being taxed. Once it became clear that the stockholders could not sell their shares of stock to Tri-County, it was inevitable, if any sale was to be made, that it was the corporation's property which would have to be sold. The only reason why the corporation refused to make a direct sale to Tri-County, as would have been the more normal procedure, is that the stockholders entertained the pious hope that the normal tax consequences could be avoided by a more elaborate procedure.

Beginning with the offer of May 31, 1940, to the very end, it was clear that the liquidation distribution was to take place only so that the stockholders would immediately sell the property to Tri-County. The offer and the contract of sale, both of which

were made while the corporation still owned the property, and the sequence of events wherein the sale to Tri-County followed by two days the distribution to the stockholders, could speak no more plainly. Indeed, the application to the Public Service Commission, which was made by all the parties, including the taxpayer, and which was required to be approved before any of the steps could be taken, establishes beyond dispute that the stockholders were to retain the property no longer than it would take to consummate the transfer to Tri-County. Ultimate ownership was to be acquired by Tri-County, not by the stockholders.

The added factor of the liquidation distribution served no other purpose than to have the transfer of title take a course more devious than would have been true of a direct sale by the taxpayer to Tri-County. Such a circuitous routing of title, however, cannot disguise the fact that it was intended all along that the corporation's property was to be sold to Tri-County and that the stockholders were not to become the true owners of the property. It cannot deflect the tax consequences from the corporation. Even though the proceeds of sale were paid directly to the stockholders, the situation is the same as though the corporation, through its agents, had sold the property in the course of dissolution, had collected the money, and distributed the cash to the stockholders on liquidation. *Commissioner* v. *Court Holding Co.,* 324 U. S. 331. Cf.

United States v. *Joliet & Chicago R. Co.*, 315 U. S. 44. See also the cases cited in footnote 2, p. 14, *supra*.

B. *Commissioner* v. *Court Holding Co., 324 U. S. 331, is indistinguishable from this case and requires that the sale be imputed to the corporation*

Commissioner v. *Court Holding Co.*, 324 U. S. 331, is conclusive that the Court of Claims erred in this case. There, the corporation had started negotiations to sell all of its property, consisting of an apartment building. After an oral agreement had been reached, it was decided that the corporation would not sell because of the tax consequences. Instead, the property was distributed to the stockholders by way of a "liquidating dividend," and the stockholders then sold the property to the same purchaser on substantially the same terms as had previously been agreed upon. In holding that the Tax Court was warranted in attributing the sale to the corporation, this Court, as we have already noted (pp. 16-17, *supra*) said that the sale by the corporation could not be transferred into a sale by the stockholders merely because they were used (p. 334) "as a conduit through which to pass title." The formalism of a liquidation distribution could not, the opinion observed, be used to disguise the true nature of the transaction.

The Court of Claims, however, attempted to dis-

tinguish the *Court Holding Co.* case on grounds so infirm that, if accepted, they would completely undermine the substantial principles on which that decision actually rested. It thought that the result there turned on the fact that the corporation, as such, had started the negotiations which were dropped to avoid the tax consequences, and that, while the sale was "nominally made by the stockholders," yet "the corporation, having initiated the sale, in effect consummated it." (R. 75.) The court below believed that *Court Holding Co.* (R. 75) "* * * did not hold that the stockholders could not have initiated negotiations for the sale in the first instance, and could not have carried it through themselves without resulting liability on the corporation for any profit derived from the sale." The guiding principle to be applied, the Court of Claims observed, was the legal right of a taxpayer to decrease his taxes by any means permitted by law. (R. 74-76.)

We subscribe to the last mentioned principle wholeheartedly. "But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended." *Gregory* v. *Helvering,* 293 U. S. 465, 469.[3] In the

[3] A bona fide liquidation distribution, of the kind contemplated by the Regulations, can take place even though the motivating considerations spring from tax consequences. For example, in the case of a closely held or a "one man" corporation, it may be decided that there are tax disadvantages in having the business continue in a corporate form and that there would be a tax advantage in having the business operate as a partnership, or under a sole proprietorship.

context of this case, the crucial question, which the Court of Claims failed to meet, is whether the pure formalism of a liquidation distribution is one of the means permitted by law to decrease the corporation's tax. *Court Holding Co.* demonstrates that it is not. There can be no doubt that a liquidation distribution took place there, and that there the stockholders, not the corporation, were the formal vendors. If a purely formal liquidation distribution is a legitimate means of avoiding the corporate tax, there is no reason why it should not have been available for that purpose in *Court Holding Co.* A legitimate means for decreasing tax liability, so long as it is actually utilized, should be no less legitimate because executed at one period of time rather than another.

The faulty analysis of the court below lies in the failure to appreciate that the crux of the *Court Holding Co.* decision was that the liquidation distribution in that case was not a *bona fide* one. Because the sale to the purchaser followed immediately after the liquidation distribution, the Tax Court drew a warranted inference that the stockholders were never intended to become the owners of

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A liquidation distribution by the corporation of all its assets to the stockholders who thereupon utilize them in a partnership, or to the sole stockholder who uses them in a sole proprietorship, would be covered by the Regulations where that is the purpose of the distribution, and no gain would be imputed to the corporation. In those circumstances, the stockholders receive the assets as owners. If the stockholders, thereafter, as an independent matter, and not as part of a preconceived plan, sell the assets, there is no reason to impute the gain to the corporation.

the property, and that the distribution was merely a formalism through which a circuitous routing of title took place. Accordingly, the Tax Court there was on firm ground in concluding that there was no provision of law which could relieve the corporation from being taxed on the gains which inhered in the corporate property, and that the sale was required to be imputed to it.

This case is actually an *a fortiori* situation. In *Court Holding Co.*, the inferences respecting the genuineness of the liquidation distribution were drawn from the sequence of events. In the present case, the underlying facts would not warrant an inference that the liquidation distribution was a genuine one. Here, as we have seen, the parties always made it crystal clear that the stockholders were never to retain ownership of the property. Indeed, the Court of Claims did not find otherwise. In these circumstances, as a matter of law, the liquidation distribution cannot serve to relieve the corporation from tax and it must be taxed with the gains which were realized when its property was sold.[4]

[4] In some circumstances, of course, the ultimate facts might not be clear. That is, conflicting inferences might be drawn from the underlying facts as to whether the liquidation distribution was intended to make the stockholders the owners of the property, free to do with it as they please. In such cases, of course, the function of drawing the requisite inferences is within the traditional province of the fact finders.

Where the fact finders have drawn a legitimate inference from different underlying facts to the effect that the liquidation distribution was not one intended to make the stock-

The Court of Claims, accordingly, was altogether wrong in attempting to distinguish *Court Holding Co.* on the ground that there the sale was imputed to the corporation because it had started the negotiations for the sale of its property, and in thinking that a contrary result was required here where the stockholders initiated the bargain to sell the corporation's property. The *Court Holding Co.* case, in searching for the "substance" of the transaction, and in looking to the "whole" rather than to "each step" of what was done, and in refusing to permit the purpose of the statute to be subverted by "mere formalisms," certainly did not make the taxable consequences turn on the capacity in which the officers or stockholders purport to act, or on whether the corporation, as here, has meticulously avoided the appearance of being a party to the transaction. The stockholders in the *Court Holding Co.* case became aware of the tax consequences only after they had disclosed their purpose by the preliminary steps taken, and were unsuccessful in their later attempts at disguise. However, as Judge Madden pointed out in his dissenting opinion below (R. 77), the taxing statute does not require a different result where, as here, the stock-

---

holders the owners of the property, and where, in harmony with the *Court Holding Co.* case, it was decided that the corporation could not escape being taxed, we have, quite properly, opposed further review by this Court. The critical comments in the taxpayer's brief in opposition with respect to the Government's position (pp. 6-7) are totally without warrant.

holders are cognizant of the tax consequences in advance. The substance of the situation here is not altered by the fact that the parties, unlike the stockholders in *Court Holding Co.*, were able to prepare the ritual before any part of the ceremony had started. Actually, as we have seen, the stockholders here disclosed the ultimate goal even more clearly than was done in the *Court Holding Co.* case.

If the decision below possessed validity in holding that the stockholders can initiate negotiations to sell the corporation's property and can carry it through themselves (R. 75) "without resulting liability on the corporation for any profit derived from its sale", no corporation need ever be taxable during dissolution, contrary to the express provisions of the Regulations. All that would be required is that, instead of being transferred to liquidating agents who act for the corporation, the property be transferred, on paper, to the stockholders as a liquidation distribution, and that the selling authorities be called "agents of the stockholders" instead of "agents of the corporation." The *Court Holding Co.* decision, we firmly believe, did not invite the use of liquidation distributions as devices for tax avoidance when part of a preconceived plan to sell the corporate property, and did not encourage an added formalism of pretending that the corporation's officers or agents act for the stockholders when dealing with the corporation's property. This seems particularly true where, as here, the officers and stock-

holders are the same individuals.[5] In this connection, in the indistinguishable circumstances presented in *Kaufman* v. *Commissioner*, 175 F. 2d 28, 30-31 (C.A. 3d), the court properly pointed out that the officers and directors of a corporation have a legal duty to deal with the corporate property for the benefit of the corporation, and not for their own advantage, and that this is as true of a closely held corporation as of any other. It observed (p. 31), as this Court has repeatedly held, that stockholders "may not wholly ignore their corporate responsibilities merely because it suits them better for tax or other purposes to act as proprietors rather than as fiduciaries." See also *Moline Properties* v. *Commissioner*, 319 U. S. 436; *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415.

In requiring that the meaningless step of the liquidation distribution be disregarded in the *Court Holding Co.* case, the decision there was not peculiar to corporate dissolutions. It was, on the contrary, applying the solid principles an-

[5] The artificiality of pretending that the parties can select the capacity in which they will act is exemplified by the fact that, while the sale to Tri-County was purportedly made on behalf of the stockholders, there were other assets which remained and which McComas and Mayes purportedly sold on behalf of the corporation. Some of this property they sold to themselves and, interestingly enough, the corporation claimed that it suffered a loss on the sale. (R. 69-71.)

Because of its decision on the issue which is on review, the Court of Claims never reached the question whether deductible losses were sustained. (R. 76.) If this Court upholds the contentions of the United States with respect to the issue on review, the case should be remanded to the Court of Claims to enable it to pass on this further question.

nounced in earlier decisions which were cited (324 U. S. 331, 334, fn. 4). Thus, the similarity between the tax-free provisions which the taxpayer attempted to invoke in *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, and those which are involved here, is quite apparent. Here, as there, the fact that there has been a formal compliance with the words of the statute is not sufficient. In the *Minnesota Tea Co.* case, the corporation would have been relieved by statute from tax on its gains to the extent that cash received by it in a "reorganization" was distributed by it in pursuance of the plan of reorganization. To the extent that the cash was not so distributed, the gain was taxable to it. The cash was actually distributed to the corporation's stockholders, but they were required to use it to pay certain debts of the corporation. The Court held that the statute contemplated a distribution to the stockholders and not a payment to the corporation's creditors, even though it was first routed through the stockholders.

Although the tax exemption provisions involved there and here are different, both contemplate a distribution to the stockholders—not one which is purely ritualistic and which is part of an integrated plan to cause the property to come to rest in someone to whom a direct transfer would be outside the purpose of the relief provisions. To accept the ritualism and to overlook the end result accomplished, as the Court of Claims and the taxpayer

would do, is to subvert the purposes for which the exemption was created. The language of the Court in the *Minnesota Tea Co.* case (pp. 613-614) is singularly apt here:

> Payment of indebtedness, and not distribution of dividends, was, from the beginning, the aim of the understanding with the stockholders and was the end accomplished by carrying that understanding into effect. A given result at the end of a straight path is not made a different result because reached by following a devious path. *The preliminary distribution to the stockholders was a meaningless and unnecessary incident in the transmission of the fund to the creditors, all along intended to come to their hands, so transparently artificial that further discussion would be a needless waste of time. The relation of the stockholders to the matter was that of a mere conduit.* The controlling principle will be found in *Gregory* v. *Helvering*, 293 U. S. 465, 469-470; * * *. (Italics supplied.)

Gregory v. *Helvering*, 293 U. S. 465, also cited in *Court Holding Co.*, similarly demonstrates how formal compliance with the words of the statute is not sufficient when merely utilized to disguise the substantive nature of the transaction. There, the taxpayer's wholly owned corporation transferred securities to a new corporation, organized to avoid taxes, which issued all its shares to the taxpayer, and which was subsequently dissolved and liquidated by the distribution of the securities to

the taxpayer. It was held that, although the transaction had the form of a corporate reorganization, it was without any business purpose and, consequently, the non-recognition provisions of the income tax law were inapplicable. This Court, examining the substance of the situation, concluded that the corporation was nothing more than a contrivance (pp. 469-470)—

> having no business or corporate purpose—a mere device which put on the form of a corporate reorganization as a disguise for concealing its real character, and the sole object and accomplishment of which was the consummation of a preconceived plan, not to reorganize a business or any part of a business, but to transfer a parcel of corporate shares to the petitioner. * * *
>
> In these circumstances, the facts speak for themselves and are susceptible of but one interpretation. The whole undertaking, though conducted according to the terms of subdivision (B), was in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization, and nothing else. The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

Griffiths v. *Commissioner*, 308 U. S. 355, and *Higgins* v. *Smith*, 308 U. S. 473, which were also

relied on in *Court Holding Co.*, likewise illustrate the application of this sound, fundamental principle, and demonstrate the broad grounds on which that case was decided. The decision below and the artificial facts on which it was decided, make a mockery of the *Court Holding Co.* case and the decisions which it applied.

CONCLUSION

The decision below should be reversed and the case remanded to the Court of Claims to enable it to decide an additional issue not passed on below.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

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No. 214.

214 IN THE Supreme Court of the United States

October Term, 1949.

UNITED STATES OF AMERICA, Petitioner

versus

CUMBERLAND PUBLIC SERVICE COMPANY,
a Corporation

On Petition for a Writ of Certiorari to the United States Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

CORNELIUS W. GRAFTON,
WILSON W. WYATT,
LOUIS LUSKY,
Counsel for Respondent.

Of Counsel:
HENRY H. MATHIS,
WYATT, GRAFTON & GRAFTON.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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On Petition for a Writ of Certiorari to the United States Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION BELOW.

The special findings of fact and opinion of the Court of Claims (R. 55-76), together with the dissenting opinion of Judge Madden (R. 76-77), are reported at 83 F. Supp. 843.

JURISDICTION.

The judgment of the Court of Claims was entered on May 2, 1949 (R. 77). The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1255 (1).

THE QUESTION PRESENTED BY THE PETITION.

The real question before the Court at this time is whether the Government is to be accorded in this Court special privileges which are not accorded to citizens and taxpayers—whether the Government may obtain a writ of certiorari more or less as a matter of course, upon grounds which do not suffice in the case of citizens and taxpayers and upon grounds which on more than one occasion this Court, *at the Government's instance,* has held to be insufficient.

Commissioner v. *Court Holding Company,* 324 U. S. 331, was decided by this Court on March 12, 1945. Since that time there have been numerous decisions of the Tax Court, the District Courts, the Courts of Appeal, and the Court of Claims in somewhat similar cases, each one decided in the light of *Court Holding Company* and the particular facts presented.

The Government has not heretofore asserted in this Court that these decisions are in conflict or that they present "an issue of considerable importance in the administration of the income tax law," as the Government now asserts.

In two of these cases, the taxpayer filed a petition for a writ of certiorari upon similar grounds and in both cases the Government represented to this Court that no important question was involved and that the decision in each case rested upon its own particular facts. *Fairfield S. S. Corp.* v. *Commissioner,* 157 F. 2d 321, certiorari denied November 12, 1946, 329 U. S. 774; and *Benjamin Guinness* v. *United States,* 73 F. Supp. 119, certiorari denied May 17, 1948, 334 U. S. 819.

Although not embodied in any rule of court, the view has sometimes been expressed that the Government's petition for certiorari in a tax case should be accorded greater weight than that of a taxpayer—this upon the theory that the Government, in the handling of a multitude of cases, is in better position to judge the importance of clarifying the law than is the taxpayer who is presumably concerned only with his own immediate problem. Whether or not there is legal justification for such a proposition under ordinary circumstances, there can certainly be none in this case. The Government has twice represented to this Court that there was no occasion to review decisions in similar cases where the taxpayer sought certiorari on the same grounds.

THE QUESTION PRESENTED ON THE MERITS.

The respondent does not agree that the question presented in this case has been accurately stated by the Solicitor General in the petition herein.

The owners of all of the outstanding shares of capital stock of Cumberland Public Service Company entered into negotiations looking to the sale of their stock. These negotiations continued over a period of several months and an offer in the sum of $86,750 was received, it being the understanding of the stockholders that this was an offer for the purchase of their stock. Subsequently it was disclosed that the proposed purchaser could not legally acquire stock in a corporation, but could legally acquire physical assets. At this point the proposed purchaser for the first time made an offer in

the sum of $104,000 directly to the corporation for the physical assets desired by the purchaser. The corporation considered this offer and unqualifiedly rejected it. At the same time, the stockholders, acting through two of their number who agreed to serve as agents for all, undertook to acquire designated physical assets as a dividend in kind, in liquidation of the corporation, and offered to sell these assets for $104,000. This offer was accepted by the purchaser, the corporation was duly dissolved, the transfer as a liquidating dividend was duly made, and the stockholders then made the sale.

The corporation did not negotiate for the sale of the physical assets and the only offer received by the corporation was the result of the stockholders' negotiations for the sale of their stock.

The question presented on the merits is not whether the process described was effective to relieve the corporation from tax liability, as the Government asserts, but whether any tax liability accrued to the corporation in the first place as a result of the events disclosed by the findings of fact.

Since the Government's petition contains a rather extensive statement of the facts and since that statement is both inaccurate and incomplete, we feel obliged to submit our own counter-statement, which we believe fairly summarizes the findings of the Court of Claims. However, since the merits of the case are not germane to the issues presented at this time, we omit them here and supply them as Appendix B, accompanied by a very brief answer to the Government's irrelevant argument on the merits.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations will be found in Appendix A.

ARGUMENT.

The Government advances three reasons for the granting of a writ of certiorari. These are:

(1) That the decision of the Court of Claims was wrong.

(2) That the present case raises an issue of "considerable importance in the administration of the income tax law."

(3) That the decision below conflicts in principle with *Commissioner* v. *Court Holding Company,* 324 U. S. 331, and with decisions of other courts rendered subsequent thereto.

The validity of all three reasons is here questioned. We will argue them briefly in the order in which they are set out above.

(1) The decision below is right. The Court of Claims did not assume that the ultimate question depends upon who appears to be the formal vendor of the property, as the Government asserts, and did not misinterpret *Court Holding Company.* We submit that the Government's attempt to argue the merits in its petition for a writ of certiorari is out of place, since this Court's Rule 38 does not list the correctness or incorrectness of a lower court's decision as a ground

for certiorari. Nevertheless, the Government's distortion of the facts and of the decision below make it appropriate for us to respond, and we do so in Appendix B.

(2) The Government's action in other cases decided since *Court Holding Company* belies the claim that this case raises "an issue of considerable importance in the administration of the income tax law."

We invite the attention of the Court to the following sequence of events:

June 21, 1946. The Court of Appeals for the Second Circuit decided *Fairfield S. S. Corp.* v. *Commissioner,* 157 F. 2d 321. The decision was in favor of the Government. The taxpayer filed a petition in this Court seeking a writ of certiorari alleging that the decision below was in conflict with *Court Holding Company* (No. 565, October Term, 1946). The Government opposed the granting of the writ with the statement, "this distinction is one of factual pattern, however, rather than of applicable principles" (Brief of the Respondent in Opposition, pp. 10-11). Certiorari was denied, 329 U. S. 774.

May 12, 1947. The Court of Appeals for the Tenth Circuit decided *Wichita Terminal Elevator Co.* v. *Commissioner,* 162 F. 2d 513. This decision was in favor of the Government.

June 4, 1947. The Court of Appeals for the Fifth Circuit decided *Howell Turpentine Co.* v. *Commissioner,* 162 F. 2d 319. Here the decision was for the taxpayer. Evidently the Government did not see evi-

dence of such conflict and confusion as would raise "an issue of considerable importance in the administration of the income tax law," for it did not seek a writ of certiorari.

December 1, 1947. The Court of Claims decided *Benjamin Guinness* v. *United States,* 73 F. Supp. 119. This was a decision in favor of the Government. The taxpayer filed a petition in this Court seeking a writ of certiorari (No. 696, October Term, 1947) asserting conflict with decisions of other courts and questions "important in the administration of the internal revenue laws." The Government opposed the petition and stated, "* * * there should be no occasion for this Court to re-examine the decision merely because a different result was reached under different facts in *Howell Turpentine Co.* v. *Commissioner,* 162 F. 2d 319 (CCA 5) and *United States* v. *Cummins Distilleries Corp.,* 166 F. 2d 17 (CCA 6), relied upon by petitioner" (Brief of the United States in Opposition, p. 15). Certiorari was denied, 334 U. S. 819.

February 6, 1948. The Court of Appeals for the Sixth Circuit decided *United States* v. *Cummins Distilleries Corp.,* 166 F. 2d 17. This was a decision for the taxpayer. The Government apparently saw no such conflict or confusion as would raise "an issue of considerable importance in the administration of the income tax law," for it did not seek a writ of certiorari in this Court.

February 24, 1948. The United States District Court for the Southern District of Illinois decided *Baum* v. *Dallman,* 76 F. Supp. 410. This was a de-

cision for the taxpayer. The Government apparently saw none of the conflict or confusion which it now claims to be so serious and alarming, because it paid the taxpayer's judgment in full with interest, not bothering either to appeal or to compromise.

April 26, 1949. The Court of Appeals for the Third Circuit decided *Kaufmann* v. *Commissioner,* 175 F. 2d 28. This was a decision in favor of the Government. The time allowed for the filing of a petition in this Court for a writ of certiorari expired three months after April 26, 1949, or on July 26, 1949. The time allowed for the filing of a petition for a writ of certiorari in our case expired on August 2, 1949. Observe with what care the Government delayed the filing of its petition in our case until July 28, 1949, at which time it was too late for the taxpayer in the Kaufmann case to file a similar petition. Obviously if the Government had filed its petition in our case while similar action was still open to the taxpayer in the Kaufmann case, that taxpayer would have been encouraged to seek a review upon the same grounds and the Government would then once again have been in the embarrassing position of contending that the Court of Claims' decision shakes the foundation of tax administration while apparently conflicting decisions (as in the case of *Fairfield S. S. Corp.* and *Benjamin Guinness, supra*) do not.

The Government has shown an astonishing ambidexterity.

We respectfully submit that the actions of the Government in similar cases since the decision of

Court Holding Company do not delineate the Government in the character of a fatherly friend of the Court brooding with anxiety over the future course of tax administration, but rather portray the Government in the light of the ordinary litigant seeking to pick up a dollar wherever and under whatever circumstances it may be found.

(3) There is no real conflict in principle among the decisions of the lower courts.

In the *Court Holding Company* case, this Court said that "the transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant." An examination of the decisions cited by the Government as being in conflict with each other and with *Court Holding Company* will disclose that in each instance the Court followed the above-quoted rule, viewed the transaction as a whole, considered each step from beginning to end as disclosed by the evidence, and rested the decision upon the conclusion thus reached. The factual situation is different in each case just as the people involved are different people. In one case the finders of the facts may be warranted in their belief that the true facts are as the evidence shows them to be; whereas in another case the finders of the facts may be satisfied from all of the circumstances that there has been a fraudulent effort to evade, as distinguished from an honest and legitimate plan to avoid.

The decision of the Court of Appeals for the Third Circuit in *Kaufmann* v. *Commissioner*, 175 F. 2d 28, is clearly distinguishable in that the negotiations in that case were conducted by one who was an officer of the corporation but neither a stockholder nor a director. This person did not testify as to whether he was acting for the corporation or for the stockholders and there was no other evidence in the case to overcome the natural inference that he was acting in the only official capacity which he had at the time—that is, for the corporation as its president. Under the circumstances the Tax Court was authorized (and could naturally be expected) to find, as it did, that the sale was negotiated by the corporation rather than by the stockholders.

When a taxpayer asserts that there is the same conflict in principle which the Government here relies upon, the Government has been quick to point out that the supposed conflict is factual rather than legal.

As we have pointed out earlier in this brief, the Government resisted the taxpayer's petition for a writ of certiorari in *Fairfield S. S. Corp.* by dismissing an alleged conflict as a mere "distinction * * * of factual pattern." Under similar circumstances in *Benjamin Guinness*, the Government said "* * * there should be no occasion for this court to re-examine the decision merely because a different result was reached under different facts in *Howell Turpentine Co.* v. *Commissioner*, 162 F. 2d 319 (C. C. A. 5) and *United States* v. *Cummins Distilleries Corp.*, 166 F. 2d 17 (C. C. A. 6), relied upon by petitioner."

Yet in its petition for a writ of certiorari in this case, the Government complains that the lower courts are making a "factual sport" of *Court Holding Company* (Petition, p. 15).

In concluding its brief in opposition to the petition for a writ of certiorari in *Fairfield S. S. Corp.* v. *Commissioner* (No. 565, October Term, 1946, Brief, p. 14), the Government said "taxpayer does not and cannot assert conflict with any decision of this Court or of any Circuit Court of Appeals."

Courts rightly hold ordinary litigants to reasonable standards of consistency and candor. Courts rightly expect that ordinary litigants will not represent a proposition to be false in one breath and true in the next as may best appear to fit the exigencies of the moment. The Government should be judged by the same standards. Surely the Government will not claim to have forgotten the propositions which it so recently and so successfully urged in this Court.

CONCLUSION.

We may well conclude this brief with a direct quotation of the conclusion of the Government's brief in opposition to the petition for a writ of certiorari in *Benjamin Guinness* v. *United States,* certiorari denied, 334 U. S. 819:

> "The decision below is in accord with this Court's decision in the *Court Holding Company*

case. There is no occasion for further review. The petition should, therefore, be denied."

Respectfully submitted,

CORNELIUS W. GRAFTON,
WILSON W. WYATT,
LOUIS LUSKY,
Counsel for the Respondent.

Of Counsel:
HENRY H. MATHIS,
WYATT, GRAFTON & GRAFTON.

APPENDIX A.

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. • • •

• • • • • • • • •

(26 U. S. C. 1946 ed., Sec. 22.)

TREASURY REGULATIONS 103, promulgated under the Internal Revenue Code:

SEC. 19.22(a)-19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

SEC. 19.22(a)-21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dis-

solution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44 (d) and section 19.44-5. (See further section 19.52-2.)

APPENDIX B.

DISCUSSION OF THE MERITS.

(1) Counterstatement of the Facts.

In its statement of the case, the Government in some instances has misquoted the facts as they were found by the Court of Claims, and in other instances has artfully omitted findings which are detrimental to its argument and which controlled the Court of Claims' decision.

The taxpayer is a corporation which was engaged in the business of generating electricity and distributing it to retail consumers. At all times material to this case it had 400 shares of stock outstanding, held equally by W. L. McComas and members of his family on the one hand, and E. S. Mayes and members of his family on the other hand (R. 56).

Tri-County Electric Membership Corporation, which will be referred to as "Tri-County," was a cooperative corporation which was organized in 1936 and obtained electrical energy from the Tennessee Valley Authority for distribution. Part of its territory included the area served by the taxpayer. Whenever Tri-County considered the acquisition of substantial additions to its electric distribution systems, it turned to the Rural Electrification Administration, Washington, D. C. (which will be referred to as "REA") for a loan with which to pay the purchase price. REA was accustomed to making such loans to local cooperatives if the REA engineers considered the price to be satisfactory and the investment sound (R. 58).

Soon after Tri-County began operating it became evident to the officers of taxpayer that taxpayer would have either to acquire power from Tennessee Valley Authority or to sell out to Tri-County. The Court of Claims found that "negotiations to that end continued more or less regularly thereafter," but this finding can be understood

correctly only by considering it in its context (R. 58). As late as October, 1939, taxpayer was seeking to purchase electric power from Tennessee Valley Authority (R. 58). Since an effort to acquire new sources of power for distribution is inconsistent with a desire to sell out to a purchaser which already has access to the same source of power, it is apparent that the meaning of the above-quoted finding is that Tri-County was more or less continuously negotiating to purchase the properties of taxpayer but taxpayer, instead of participating in those negotiations, was seeking a new source of power which would enable it to stay in business for itself.

Upon taxpayer's failure to purchase power from TVA, taxpayer inquired of TVA whether a sale of its properties could be effected. Nothing came of this inquiry and there were no further discussions with TVA on this subject. None were shown by the evidence and none were found by the Court of Claims (R. 58-59).

On February 16, 1940, there was a meeting at Murfreesboro, Tennessee, at which representatives of the taxpayer offered to sell all of the outstanding stock of taxpayer. The Government boldly states, "It developed, however, • • • that a sale of the stockholders' stock would not be possible because REA would not finance such a purchase but would only finance Tri-County's acquisition of certain of the taxpayer's property." The Court of Claims did not so find. It found that "representatives of the REA expressed *some doubt* as to whether or not that organization could finance a purchase of the stock of the company, *but the determination of this question was deferred* until the legal representatives of the REA in Washington could be consulted" (R. 60). (The emphasis is ours.)

The legal representatives of the REA were later consulted and it was their conclusion that REA had no legal power to finance a purchase of stock, but this conclusion was not communicated to the taxpayer or to any representative of the taxpayer until May 15, 1940 (R. 61). In the three months which intervened between February 16

and May 15, the parties were seeking to reach an agreement as to price, the legal question being obviously immaterial if no agreement could be reached on this point. During this intervening period, the stockholders adhered to their determination to sell their stock and declined an offer in the sum of $86,750 which they understood to be on that basis. That this is true is disclosed by the findings of fact as reproduced on pages 60 and 61 of the Record, for it is shown (R. 61) that after the legal decision was communicated to taxpayer "Mr. Herring, representing the REA, then made an offer of $104,000 for the physical properties desired."

It is thus apparent that the stockholders of taxpayer negotiated for the sale of their stock and it was not until a legal impediment was found that the prospective purchaser made an offer directly to the corporation.

At this point the taxpayer corporation first came into the picture and it was necessary to decide whether it should accept the offer thus received. In order to have before it an idea of the dollars and cents result, the taxpayer and the stockholders caused tax computations to be made by a firm of accountants. These computations disclosed that there would be a tax liability on the part of the corporation in the event it should sell its physical properties. This tax, which was later paid under protest at the insistence of the Commissioner of Internal Revenue, amounted to approximately $17,000 (R. 57). It should be perfectly obvious that if the corporation had made this sale and had paid the tax the net result to the corporation would have been approximately $87,000, which is almost exactly the same figure which had been turned down by the stockholders at a time when they were trying to sell their stock in a transaction which would not have involved the $17,000 tax. Having considered the prospective tax liability the corporation unqualifiedly refused the offer of $104,000. "After considering the net result to the corporation, the directors of Cumberland Public Service Company have determined that the corporation will not accept

an offer of $104,000 for the transmission and distribution lines" (R. 62).

Simultaneously and in the same letter, W. L. McComas and E. S. Mayes, the two principal stockholders, offered to enter into a contract pursuant to the terms of which they undertook to acquire from taxpayer corporation the properties desired by the prospective purchaser, and thereafter to sell the same to the purchaser for $104,000. This was contingent upon obtaining TVA power on a temporary basis to permit consumers to be served until such time as the proposed transaction could be consummated (R. 62-63).

It was found that arrangements for temporary TVA power could be made and thereafter "the offer of May 31 was accepted by Tri-County" (R. 64). The "offer of May 31" was not an offer on the part of taxpayer corporation to sell its assets but was the offer of McComas and Mayes to acquire the assets and thereafter sell them (R. 62-63). Subsequently, the parties executed a written instrument which clearly discloses on its face that the transaction was one between Tri-County as purchaser and McComas and Mayes as sellers (R. 64-65).

Thereafter, members of the Mayes family transferred their stock to E. S. Mayes as their agent, and members of the McComas family transferred their stock to W. L. McComas as their agent. The corporation was then dissolved, and the transmission and distribution lines were conveyed to McComas and Mayes as the only stockholders of record, as a liquidating dividend, pursuant to proper corporate action. McComas and Mayes, joined by their wives, then conveyed these properties to Tri-County, received the purchase price, and made distribution to the stockholders pursuant to the agency contracts (R. 65-68).

The Commissioner determined deficiencies in the taxpayer's income, declared value excess profits and defense taxes for the calendar year 1940 resulting, in part, from his determination that the property in question had been sold by the corporation and that the resulting gains should

have been included in its taxable income. The asserted deficiencies were paid, taxpayer filed a timely claim for refund, the claim was rejected, and proceedings were instituted in the Court of Claims to recover the tax with interest (R. 57-58). The Court of Claims entered judgment for the taxpayer (R. 77).

(2) Synopsis of Argument on the Merits.

The decision below is right. The Court of Claims did not assume that the ultimate question depends upon who appears to be the formal vendor of the property, as the Government asserts, and did not misinterpret *Court Holding Company*. Instead, the Court of Claims properly distinguished between (a) cases in which, considering all the circumstances, it is apparent that a corporation negotiated for the sale of its property, completed acceptable arrangements, and then attempted to create a record having a different appearance for the purpose of evading a tax liability already incurred; and (b) cases, such as this one, where, upon consideration of all the facts and circumstances, it is apparent that the corporation never intended to sell, never negotiated toward a sale of its properties, and did not in fact sell them.

The decision of the Court of Claims recognizes both *Court Holding Company* and the often affirmed right of a taxpayer "to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits," citing *Gregory* v. *Helvering*, 293 U. S. 465, 469; *United States* v. *Isham*, 17 Wall. 496, 506, and other cases.

These principles are not in conflict, as the Government apparently contends, but may be applied concurrently to the facts of each case. Under the one doctrine, a taxpayer is permitted to survey the various courses before him and to select and follow deliberately, a course which incurs the least possible tax liability or no tax liability at all. Under

the other doctrine, a taxpayer is not permitted to incur a tax liability and then fraudulently seek to evade it.

The distinctions between our case and *Court Holding Company* are clear and obvious. In *Court Holding Company* the corporation initiated the negotiations for the sale, agreed upon every detail, received a down payment in the sum of $1,000, and met with the purchaser to prepare a contract embodying the agreements so reached. At this point the heavy tax liability was discovered and the corporation, seeking to avoid the tax, then attempted to retrace its steps, by dissolving, distributing its property as a liquidating dividend, and permitting the stockholders to convey to the purchaser. The Tax Court found that what appeared to have happened did not actually happen, perhaps a clinching circumstance being that the corporation retained the $1,000 down payment and the stockholders permitted the same to be credited upon the purchase price theretofore agreed upon by the corporation.

Quoting the opinion of the Court of Claims in our case (R. 75-76):

> "These are not the facts here. From the very beginning it was the stockholders who were negotiating for the sale of their stock. There was never any intention that the corporation should make the sale, and even when the REA determined that they could not furnish the money to Tri-County to buy the stock, the stockholders still persisted in their purpose of making the sale themselves, and for this reason they caused a dissolution of the plaintiff company, and the stockholders then in fact made the sale of the physical properties received by them as a liquidating dividend.
>
> "We are of the opinion that the principle first laid down by the Supreme Court in the *Isham* case, 17 Wall. 496, and reiterated in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, and in *Gregory* v. *Helvering*, 293 U. S. 465, is still the law. If this principle be applied to the facts of this case, we think it is altogether untenable to say that, although the sale in this case was ostensibly made by the stockholders, it was in fact made by the corporation.

"The view we have taken is the same as that taken by the 5th Circuit Court of Appeals in the case of *Howell Turpentine Co. v. Commissioner*, 162 F. (2d) 319, in which opinions were written by Judge Sibley, and by Judges Hutcheson and Lee, all of whom expressed the opinion that although the avowed purpose is to reduce taxation, nevertheless the stockholders of a corporation may validly contract to dissolve the corporation and to sell the physical assets themselves. See also *Commissioner* v. *Falcon Co.*, 127 F. (2d) 277; *United States* v. *Cummins Distilleries Corp.*, 166 F. (2d) 17; *Acampo Winery & Distilleries, Inc.*, v. *Commissioner*, 7 T. C. 629."

It is submitted that the Court of Claims correctly decided the case on the facts before it.

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No. 214.

IN THE

Supreme Court of the United States

October Term, 1949.

UNITED STATES OF AMERICA, Petitioner,

vs.

CUMBERLAND PUBLIC SERVICE COMPANY, a Corporation,
Respondent.

On Writ of Certiorari to The United States
Court of Claims.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

Opinion Below.

The special findings of fact and opinion of the Court of Claims (R. 55-76), together with the dissenting opinion of Judge Madden (R. 76-77), are reported at 83 F. Supp. 843.

Jurisdiction.

The judgment of the Court of Claims was entered on May 2, 1949 (R. 77). A petition for a writ of certiorari was filed on July 28, 1949, and was granted on October 17, 1949 (R. 78). The jurisdiction of this Court rests on 28 U. S. C., Section 1255(1).

QUESTION PRESENTED.

The respondent does not agree that the question presented in this case has been accurately stated by the Solicitor General in his brief herein.

The owners of all of the outstanding shares of capital stock of Cumberland Public Service Company entered into negotiations looking to the sale of their stock. These negotiations continued over a period of several months and an offer in the sum of $86,750 was received, it being the understanding of the stockholders that this was an offer for the purchase of their stock. Subsequently it was disclosed that the proposed purchaser could not legally acquire stock in a corporation, but could legally acquire physical assets. At this point the proposed purchaser for the first time made an offer in the sum of $104,000 directly to the corporation for the physical assets desired by the purchaser. The corporation considered this offer and unqualifiedly rejected it. At the same time, the stockholders, acting through two of their number who agreed to serve as agents for all, undertook to acquire designated physical assets as a dividend in kind, in liquidation of the corporation, and offered to sell these assets for $104,000. This offer was accepted by the purchaser, the corporation was duly dissolved, the transfer as a liquidating dividend was duly made, and the stockholders then made the sale. The corporation completely and finally wound up its affairs by distributing some of its remaining assets in kind as another liqui-

dating dividend and by selling the rest and distributing the proceeds of the sales of its stockholders.

The corporation did not negotiate for the sale of the physical assets and the only offer received by the corporation was the result of the stockholders' negotiations for the sale of their stock.

The question presented is not whether the process described was effective to *relieve* the corporation from tax liability, as the Government asserts, but whether any tax liability *accrued to the corporation in the first place* as a result of the events disclosed by the findings of fact.

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved in this case are correctly set forth on pages 2 to 4 of the Government's brief. They will also be found in Appendix A.

COUNTERSTATEMENT OF THE FACTS.

The Government's summary of the special findings of fact made by the Court of Claims (R. 56, *et seq.*) are fair as far as they go, but the Government has omitted any reference to facts which are important in the taxpayer's theory of the case and which were held by the Court of Claims to be controlling. It is, therefore, necessary for us to supplement the Government's summary of the facts.

The Government's summary of the findings is fair and accurate in its description of the nature of the

taxpayer corporation's business, the ownership of the capital stock of taxpayer, the organization of Tri-County Electric Membership Corporation (which we will also refer to as Tri-County), and the events which transpired before February 16, 1940. On that date the parties met at Murfreesboro, Tennessee, to discuss the possibility of the acquisition by Tri-County of the transmission and distribution lines of the taxpayer (Finding 6, R. 59). At that meeting Mr. McComas made no offer except to sell all of the outstanding capital stock of the taxpayer corporation. Representatives of the REA expressed some doubt as to whether or not that organization could finance a purchase of the stock of the Company, but the determination of this question was deferred until the legal representatives of the REA could be consulted[1] (R. 59-60).

No decision of the REA legal staff on this point was communicated to the taxpayer, its stockholders, or their attorneys until May 15, 1940, when Attorney Arthur Grafton visited the Washington office of REA. After Grafton was definitely advised that the REA could not lawfully advance money to Tri-County for the acquisition of the stock of taxpayer, but could advance money for the purchase of the properties them-

[1]Mr. McComas' attorney had considerable justification for believing that the REA could legally make a loan for the purchase of capital stock. A close analogy to the situation is found in Section 179 of the Constitution of Kentucky, which provides in part: "The General Assembly shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association or corporation * * *." Yet in *Maysville & Lexington Turnpike Road Co.* v. *Wiggins*, 104 Ky. 540, 47 S. W. 434, *Long* v. *Mayo*, 271 Ky. 192, 111 S. W. 2d 633, and *Cawood* v. *Coleman*, 294 Ky. 858, 172 S. W. 2d 548, the highest court of Kentucky has construed the Constitution as not prohibiting a municipality from purchasing all of the stock of a corporation if the corporation is immediately to be dissolved and its assets transferred to the municipality.

selves, the REA engineer, Mr. Herring, made an offer of $104,000 for the physical properties desired (R. 61). No offer to purchase the properties from the corporation was made prior to May 15, 1940, and what was done between February 16th and May 15th represented the efforts of the parties to agree as to price, it being obvious that the legal question posed at the Murfreesboro meeting on February 16th would be moot if price agreement could not be reached. Prior to May 15, 1940, the only offer made by anyone was the offer of the stockholders to sell all of the outstanding stock. It was during this period, prior to the announcement of the REA legal decision and at the time when the only outstanding offer was the offer to sell the stock, that the REA engineer, Mr. Herring, wrote to Mr. McComas the letter of April 11, 1940, offering $86,750 (R. 60-61). That letter significantly was not addressed to the taxpayer corporation or to Mr. McComas as president of the taxpayer corporation, but was simply addressed to W. L. McComas (R. 60). We submit that Mr. McComas could not have understood that letter to be other than a suggestion of the price REA would approve for the only thing McComas had offered to sell—that is, the outstanding stock.

When Mr. Herring made the offer of $104,000 for the physical properties on May 15, 1940, Attorney Arthur Grafton communicated the offer to McComas and Mayes who, with their families, owned all of the outstanding stock of the corporation. McComas and Mayes directed Grafton to write to Herring a letter (R. 61) declining to take any action on the offer until

the tax consequences might be investigated. A firm of certified public accountants was thereupon employed to prepare computations of the taxes which would be incurred in the various ways through which Tri-County could acquire the assets which it desired. These computations disclosed that if the corporation sold the assets to Tri-County for $104,000, a gain would be realized by the corporation, giving rise to a tax liability. That tax was subsequently assessed by the Commissioner of Internal Revenue in the sum of $17,054.70 (R. 57). It is obvious that the price offered for the assets would, after payment of the tax, net the corporation only $87,000 and this figure was almost identical with the offer of April 11, 1940, which the stockholders understood to be an offer for their stock, the sale of which would not have given rise to the $17,000 tax liability. The stockholders decided that the corporation should reject the $104,000 offer and it was flatly rejected in Grafton's letter to Mr. Herring on May 31, 1940 (R. 62).

There is no finding of fact that the corporation participated in the negotiations which were conducted by the stockholders prior to May 15, 1940 in an effort to sell their stock, and there is no finding of fact that the corporation took any action on the offer of May 15, 1940, except to consider it for sixteen days and emphatically reject it.

In the same letter dated May 31, 1940, and after the unqualified rejection of the $104,000 offer, Mr. McComas and Mr. Mayes offered as a new proposition to acquire from the taxpayer the properties desired

by Tri-County and thereafter to sell them to Tri-County for $104,000, provided certain conditions could be met (R. 62-64).

It was this new offer on the part of McComas and Mayes which was accepted by Tri-County (R. 64) and the subsequent written agreement clearly shows that the properties were to be sold by McComas and Mayes. The taxpayer corporation was not a party to the instrument (R. 64-65) and did not receive the agreed consideration directly or indirectly.

Thereafter the members of Mr. McComas' family transferred their stock on the records of the corporation to W. L. McComas pursuant to written contracts wherein he was designated as their agent to assist in the liquidation of the corporation and to receive for them their distributable portion of the assets of the corporation (R. 65). The Mayes group of stockholders also transferred their shares of stock to E. S. Mayes pursuant to similar agreements, excepting only three shares which were retained by F. M. Mayes, because Kentucky law at that time required a corporation to have three directors, each of whom was required to own three shares of stock.[2]

Steps were then taken pursuant to then existing Kentucky Law[3] and the corporation was dissolved (R. 65-68). In the proceedings, conveyance of the transmission and distribution lines to the stockholders as a liquidating dividend in kind was authorized (R. 67), and this was done on October 22, 1940 by means

[2]Carroll's Kentucky Statutes, 1936 Edition, Section 551.
[3]Carroll's Kentucky Statutes, 1936 Edition, Section 561.

of a deed to W. L. McComas and E. S. Mayes, who were then the only stockholders of record, F. M. Mayes having transferred his qualifying shares to E. S. Mayes the day before (R. 68). Two days later McComas and Mayes (joined by their wives for the purpose of conveying their dower interests) executed and delivered a deed to Tri-County and received the agreed consideration (R. 68-69).

The corporation then proceeded to wind up its affairs by distributing in kind $37,000 of mortgage notes of another corporation, transferring certain life insurance policies to the insured persons named therein for the exact amount which the corporation had invested in the policies, and by selling the remaining physical assets and the accounts receivable (R. 69-71).

The corporation was thus completely and finally dissolved and since the latter part of 1940 has had no business or affairs except this litigation.

SUMMARY OF THE ARGUMENT.

As a preliminary to our detailed discussion of the points raised by the government, we believe it will be helpful if we isolate and articulate the major fallacy which permeates the government's argument. Once this fallacy is examined and its nature understood, it will become clear that the petitioner's argument, ingenious though it is, fails to grapple with the real issue in the case.

The fallacy, in brief, is the government's bland assumption that a certain taxable event (a sale by the

corporation) did in fact take place, and that the question is therefore whether "a liquidation distribution can be utilized to *relieve the corporation from tax*" (Petitioner's brief, p. 2; emphasis ours). If that were the question, this case would never have arisen. If the corporation had made the sale, the resulting gain would obviously have been taxed to it and the corporation could have found no legal basis whatever for contending that its subsequent dissolution could in any way have diminished or cancelled that tax liability.

It will thus be seen that the government assumes at the outset the very point which is here in issue—that is to say, whether the corporation did or did not make the sale to Tri-County. The government's brief is not addressed to this issue but starts at the point where this case should finish.

The Government's brief (p. 14) correctly states that "a corporation is a separate taxable entity from its stockholders; the corporate income, for tax purposes, cannot be imputed directly to the stockholders, no matter what the devices employed," citing *National Carbide Corp.* v. *Commissioner*, 336 U. S. 422; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Moline Properties* v. *Commissioner*, 319 U. S. 436, and other cases. The reverse is equally as true. The income of the stockholders may not be imputed directly to the corporation unless from an examination of the acts of the parties and the surrounding circumstances, the conclusion can be reached that the stockholders were

acting as agents of the corporation and not for themselves.

The Government's argument, in effect, is that since the corporation could have made a sale, the stockholders must have made the sale as agents of the corporation. We submit that this is not good law, despite the fact that a United States Court of Appeals has, we believe carelessly, said so.[4] The Court of Claims (R. bottom of p. 75 and top of p. 76), after hearing the evidence, said:

> "From the very beginning it was the stockholders who were negotiating for the sale of their stock. There was never any intention that the corporation should make the sale, and even when the REA determined that they could not furnish the money to Tri-County to buy the stock, the stockholders still persisted in their purpose of making the sale for themselves, and for this reason they caused a dissolution of the plaintiff company, and the stockholders then in fact made the sale of the physical properties received by them as a liquidating dividend."

As we will undertake to demonstrate in detail later in this brief, *Commissioner* v. *Court Holding Co., supra,* is not controlling here. There the corporation in fact made the agreement to sell and the *corporation's* sale was then carried out under guise of a sale by the stockholders. The agreement to sell was the taxable event and it gave rise to a corporate tax

[4]United States Court of Appeals for the Third Circuit in *Kaufmann* v. *Commissioner*, 175 F. 2d 28. *Contra, Howell Turpentine Co.* v. *Commissioner*, United States Court of Appeals for the Fifth Circuit, 162 F. 2d 319.

liability for that reason. In our case the corporation made no such agreement. Instead the stockholders, acting for themselves and not as agents for the corporation, made the sale and incurred a lesser tax liability of their own which they have long since paid. Since a corporation and its stockholders are recognized separate entities, for tax as well as other purposes, each must respond for its own actions and neither may be charged with the actions of the other. Similarly a corporation is not liable for a tort of a stockholder and a stockholder is not liable for a tort of the corporation.

The decisions of this Court which are invoked by the petitioner are irrelevant. In the detailed argument, we will discuss each case, but here it is enough to say that cases involving corporate reorganizations (whether pretended or real) are not in point, for the relief from taxation which is available through genuine reorganizations is by way of an exemption from a liability otherwise imposed by law, whereas here the issue is whether a tax liability arose in the first place. Neither are we concerned with cases[5] where corporations remained in existence and attempted to route income or property directly to stockholders, for in our case the corporation was finally and completely dissolved. Nor was any sham or useless device employed here as in *Gregory* v. *Helvering*, 293 U. S. 465, for a corporate dissolution is by no means a "device" of any sort. If the corporation had sold its property, as the Government wishes it had done, the corporation

[5] *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *United States* v. *Joliet & Chicago R. Co.*, 315 U. S. 44.

would nevertheless have dissolved and distributed its assets as the logical result of having divested itself of those franchises and properties with which it carried on the business for which it was created. Under such circumstances the Government certainly would not suggest that dissolution would have been either unreal or useless. Surely the mere fact that a logical, lawful, and real course of action was pursued at one time rather than at another time cannot change its character.

It is true, of course, that the present Internal Revenue Code embodies a rule which, as applied to the sale of all or nearly all of a corporation's assets, makes tax liability depend on the sequence of events more than on the substance of the transaction. If stockholders of a corporation sell their stock, no tax liability on any resulting gain accrues to the corporation. If there is a gain from the sale, that gain is taxable to the stockholders. If the purchaser of the stock then liquidates the corporation, there is ordinarily no tax on the purchaser because the value of the property received in liquidation is no greater than the cost basis of the stock. However, if the corporation sells its assets and then liquidates with resulting distribution to the stockholders, the corporation must first pay one tax upon its gain and the stockholders must then pay a second tax on the gain to them, represented by the difference between the value of the assets distributed to them and the cost basis of their stock.

In each instance the end result is precisely the same yet by reason of the fact that the transactions are handled in different ways, there is a vast difference in the amounts of the resulting taxes. Form is thus given greater dignity than substance.

For present purposes there is no occasion for us either to approve or criticize this rule of law.[6] The significant fact, for the purposes of this case, is that the existing laws do not express any intention to impose the double tax where a corporation is dissolved, its properties are distributed in liquidation, and the stockholders make a sale thereof. Neither do the laws negative such an intention. Section 22 of the Internal Revenue Code[7] defines "gross income" but contains no language which throws any light upon the congressional intent in this respect. The Treasury Regulations[8] affirmatively provide that the corporation does not realize a gain or loss from the mere distribution of its assets in kind in partial or complete liquidation. The Government is here urging the Court to legislate, and to do so contrary to the Government's own regulations.

The present case is a good example of the way in which the Commissioner of Internal Revenue consistently attempts to seize upon language used by this Court and use it as a means of stretching and distort-

[6]The rule has been criticized by responsible authority and it has been recommended to Congress that only one tax be imposed regardless of the form of transaction (Report of the Special Tax Study Committee appointed pursuant to HR 293 and HR 297—80th Congress—Heading, "Sales of Corporate Stock or Property."

[7]Reproduced in Appendix A.

[8]Treasury Regulations 103, Section 19.22(a)-19 and Section 19.22 (a)-21, reproduced in Appendix A.

ing the law to extremes which were never intended. Other examples are the so-called Clifford Trust Cases and the family partnership cases in which the Commissioner has consistently urged upon the lower courts extreme interpretations which have obliged this Court to assume jurisdiction again and restrict the application of earlier decisions within reasonable bounds.

Here the extremes are easy to understand. At one end of the line is the situation where a corporation clearly sells its property, realizes a gain, and incurs a tax liability. At the other end of the line is the situation, suggested by a footnote in the Government's brief, where a corporation dissolves and distributes its assets to its stockholders, and thereafter, considerable time having elapsed, the stockholders make a sale which they did not have any idea of making at the time of the corporate dissolution. In such a situation the Government concedes that no liability would accrue to the corporation, and the stockholders would simply pay taxes resulting from their own gains.

Between these two extremes there will be as many variations of factual situations as there are corporations, stockholders, and purchasers. We submit that it is the function of the finders of the facts to examine the evidence, including not only the overt acts of the parties and what they say they thought and did but also every surrounding circumstance which might tend to demonstrate the substance of what took place. From such an examination the finders of the facts should ascertain what occurred—whether the corporation in question really made a sale or did not make a

sale. If it is concluded as a question of fact that the corporation did make a sale, then the corporation must respond for its own action and pay whatever tax liability grows out of that sale. If it is concluded as a question of fact that the corporation did not make the sale, then the corporate entity may not be subjected to a tax liability which arises out of the actions of separate taxable entities—the stockholders.

The Court of Claims examined the evidence in this case and found that no sale was made by the corporation. The Government urges that this Court, contrary to the Government's own regulations, should uphold a tax assessed by the Commissioner against the corporation for an alleged act which has been found not to have occurred. In substance the Government argues that the sale must be regarded as having been made by the corporation if, at the time the stockholders received the corporate assets in liquidation, they intended to dispose of such assets rather than keep them in their own hands for the indefinite future.

Any such rule as this, imposing a tax liability on one taxable entity by reason of what transpires in the mind of another taxable entity, would indeed bring about a far greater confusion in the administration of the tax laws than the alleged confusion of which the Government here complains. Indeed, such a rule would reduce tax administration to a ghastly mess. The Government does not suggest the answers to many difficult questions which would be posed by such a rule and which could only be settled by interminable litigation. Suppose some but not all of the stockholders

intend to dispose immediately of the assets received in liquidation. Would the corporation then be liable for a tax in proportion to the number of stockholders so intending? Suppose all or some of the stockholders intend to make an immediate resale and later change their minds or find that a sale cannot be consummated. Would the corporation then have a tax liability one minute and not have a tax liability the next minute?

The answer, which is clear and easy to apply, as well as logical and consistent with recognized principles of law, is that the corporation must answer, for tax purposes as well as for every other purpose, for its own actions and cannot be required to answer for the acts, much less the intentions, of other than its own agents. When the finders of the facts have determined who made the sale, the applicable tax liability is then fixed and that is the end of the matter. The *Court Holding Co.* case was one in which the corporation was found to have made a sale of its property and therefore became liable for a tax on the resulting "gross income" as defined by Congress. The *Court Holding Co.* case does not, as the Government here contends, say that a sale found by the triers of the facts to have been made by the stockholders may or should be treated as a sale of the corporation.

As this Court said in *Commissioner* v. *Culbertson* (decided June 27, 1949), "The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income."

Taxpayers are not required to choose that course of action which brings upon them the greatest tax liability, and they should not be expected to do so. This Court has on many occasions affirmed the right of taxpayers to choose the course which results in the least tax liability. That is all that was done by the stockholders of Cumberland Public Service Company.

ARGUMENT.

FIRST POINT: It Is Permissible for the Stockholders of a Corporation to Contract for the Sale of Property Which They Anticipate Receiving In A Prospective Liquidation. In Doing So They Are Not Agents of the Corporation.

When we think of corporations the most natural picture which comes to mind is that of a large corporation having a large volume of business, numerous creditors, several classes of stock, and a vast number of stockholders. Management is quite often in the hands of persons who are not stockholders or who in any event do not have voting control. At stockholders' meetings, there is never 100% representation of the stockholders. The interests of the holders of various classes of stock are quite often different. The officers and directors are in a very real sense trustees for stockholders too numerous to participate personally in the management of the corporate affairs. The correct rule of law governing the conduct of such officers and directors is that they stand in a fiduciary relationship

to the stockholders and may not deal with the property of the corporation for their own benefit.

The same rule of law applies in the case of a small corporation whose stock is closely held in one or more family groups, as in the case of the taxpayer here. However, in the case of the small family corporation, it is possible for a situation to exist which is practically impossible in the case of the larger corporations—that is to say, the best interests of all of the stockholders may easily be ascertained and all of the stockholders can be in complete agreement as to the desirability or undesirability of any given course of action. In the case of such small family corporations, the officers and directors are still trustees for the stockholders, but the stockholders are themselves and members of their families having interests identical with their own. In such a case if the rights and interests of creditors of the corporation are not affected, the interests of the corporation and the interests of the stockholders are identical. We submit, therefore, that actions of the officers and directors which serve the best interests of all the stockholders, do not prejudice the rights of creditors, and are within the course of established corporate law, do not violate the fiduciary relationship and are not subject to criticism. Of course, the president of the smallest corporation may not deal with corporate property for his own benefit and at the expense of the creditors or other stockholders. But this does not mean that by reason of the fact that he is president, he is thereby in some way prohibited from dealing with the corporate property in such a manner

as will not prejudice creditors and will affirmatively benefit every stockholder. In short, can it be said that the corporation can have a "best interest" of its own separate and distinct from and inconsistent with the "best interests" of the creditors and stockholders? We think not. The fallacy in such a proposition is easily demonstrated. If a corporation may have a "best interest" of its own, then its ultimate and greatest interest would be in continuing its corporate existence perpetually, for self-preservation is the first law of nature. If then the directors of the corporation should take action to terminate the corporate existence, it follows that they would be violating their fiduciary obligations. The directors would, therefore, be obliged to vote against dissolution even though dissolution might be desired by all of the stockholders or whatever majority thereof may be empowered to bring about dissolution under the law of the State or country of the corporation's domicile. Since dissolution procedure in nearly all jurisdictions provides for action by the directors as a required step, it would then be impossible ever to dissolve a corporation.

In our case, Cumberland Public Service Company was in the public utility business, serving a few small communities in three counties of Southern Kentucky (R. 56). Its source of electric power (generating equipment) was inadequate and it was gradually being surrounded by the operations of Tri-County, whose purpose was to absorb it. Soon after Tri-County began operating, it became evident to Cumberland that unless it could contract to obtain electric power from Tennessee Valley Authority, it would eventually have to

resign itself to this absorption (R. 58). In October, 1939, Mr. McComas called upon the Chief Power Engineer of Tennessee Valley Authority and when it was learned that no power could be obtained from that source, the handwriting was on the wall. With the last hope for new life-blood denied, it then became inevitable that this little utility company could not survive long. Whether the corporation first dissolved and then permitted the stockholders to receive the assets and dispose of them or whether the corporation should first sell its property and then dissolve—in either event dissolution was the logical course. This dissolution is now characterized by the Government as a useless device comparable to the sham corporation found in *Gregory* v. *Helvering*, and in that case created to give the appearance of a corporate reorganization otherwise serving no imaginable purpose.

Since the termination of the corporate existence of Cumberland Public Service Company by reason of its imminent inability to continue adequate electric service to its customers was clearly written in the sky, it became the duty of the officers and directors to select which of several courses should be pursued. Engulfment by Tri-County could be accomplished in three separate ways, each as lawful as the others:

(a) The stockholders could sell all of the outstanding stock to Tri-County and pay their individual taxes on the resulting capital gain.

(b) The corporation (with the consent of the holders of not less than three-fourths of the capital stock)[9]

[9]Carroll's Kentucky Statutes, 1936 Edition, Section 883(b)-3.

could sell properties direct to Tri-County. In this event the capital gain, if any, would result in a tax liability of the corporation. Having sold its flesh and bones (franchises and distribution lines) it would no longer have been able to carry out the purposes of its incorporation and would in due course have dissolved, wound up its affairs, liquidated its assets, and made distribution to the stockholders who would then have had to pay a second tax.

(c) The stockholders acting in the manner provided by law could dissolve the corporation, distribute its assets either in cash or in kind, and leave the stockholders to their own devices. If this course was followed, then under the law and the Treasury Regulations the corporation would be chargeable with neither gain nor loss and the stockholders would then pay whatever tax was incident to their transaction.

It will be observed that all three courses were, under the law of Kentucky as it existed at that time, wholly within the control of the stockholders. The corporation could not be dissolved without their consent and the corporation could not sell all or substantially all of its assets without their consent. If the corporation received an offer for its properties, it could not have accepted the same without consulting the stockholders.

Acting upon the doctrine so often affirmed by this Court that they were at liberty to select the course of action which would minimize taxes, the stockholders looked over the three alternatives disclosed above and decided to proceed by attempting to sell the stock. This they did through W. L. McComas on February 16, 1940,

at the Murfreesboro meeting. Although the REA engineer voiced a doubt as to whether Tri-County could obtain a loan from the REA for the purpose of buying the stock, he did not know the answer to this question and "the determination of this question was deferred until the legal representatives of the REA in Washington could be consulted" (R. 60).

With the matter in this state, the parties separated and the next development was the REA letter of April 11, 1940 (R. 60) suggesting that the REA would approve a loan to Tri-County for $86,750 if the deal could be made at that price. This proposition was declined by Mr. McComas and Mr. Mayes (R. 61). On May 15, 1940, Grafton was in Washington and called at the REA office to ascertain whether the offer could be increased. The REA attorneys were called in and they then, for the first time, communicated their decision that the REA was without lawful authority to make a loan for the purchase of stock. Mr. Herring, the engineer representing the REA, then made an offer of $104,000 for the physical properties desired (which was, of course, an offer to the corporation). Grafton communicated this offer to McComas and Mayes, whereupon the accountants were employed, the tax aspects surveyed, the offer was rejected and the new proposal of the stockholders submitted (R. 61-64).

The Government insists that when Mr. McComas attended the conference in Murfreesboro, Tennessee, he was just as much the president of the corporation as the representative of the stockholders and that his

action in offering to sell the stock should be construed as a corporate offer to sell the property. The short answer to this proposition is that in offering to sell the outstanding stock, Mr. McComas could not have been speaking for the corporation, for the corporation did not own its outstanding stock. That stock was owned by the stockholders and an offer to sell it could be made only by the stockholders themselves or someone acting in their behalf.

In *Howell Turpentine Co.* v. *Commissioner*, 162 F. 2d 319 (322), the Court of Appeals for the Fifth Circuit pointed out that a stockholder of a corporation as such has no title, legal or equitable, to the corporation's property; that he can sell his interest by selling his stock; but that he cannot effectively convey any particular property of the corporation prior to a liquidation. The Court then goes on with the following statement which we believe to be a correct statement of the law:

> "But he may validly *contract to sell* it before any steps are taken towards liquidation, if he has a reasonable prospect of obtaining title to it within the time fixed by the contract for the conveyance. This is true of stockholders as it is of people in general who have a prospect of obtaining title and are willing to assume a personal liability if they should fail. 'It is not unusual for persons to agree to convey by a certain time notwithstanding they have no title to the land at the time of the contract, and the validity of such agreements is upheld. In such cases the vendor assumes the risk of acquiring the title and making

the conveyance, or responding in damages for the vendee's loss of his bargain. * * * Whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in position to make a valid agreement for the sale thereof, without disclosing the nature of his title.'" (The emphasis was supplied by the Court.)

Later in the same opinion it is said:

"* * * The only plausible ground put forward for inferring the sale to have been made by the Company is that the property was owned by it and that D. F. Howell was its president and could appropriately have negotiated for the Company prior to Sept. 6. But it is equally true that he was the controlling stockholder and could as appropriately have negotiated for himself and did not have to own the land, under the circumstances, to do so."

The suggestion of a contrary view which is found in *Kaufmann* v. *Commissioner*, 175 F. 2d 28, was, we believe, made without adequate analysis. In any event the facts in that case are clearly distinguishable as we will undertake to demonstrate later in this brief.

SECOND POINT: The Contract of the Stockholders Was Real In That It Was Binding Upon Them and Imposed A Liability Upon Them for Which They Could Have Been Required To Respond In Damages Whether They Were Successful In Obtaining the Property In Liquidation or Not.

There is no suggestion in the record that there were any agreements or understandings, concealed or otherwise, between the corporation and Tri-County. Only one agreement was made in the entire course of the proceedings. That agreement was reached when Tri-County accepted the offer of McComas and Mayes as set forth in Arthur Grafton's letter of May 31, 1940 (R. 62-63). The Court of Claims found that "* * * the offer of May 31 was accepted by Tri-County" (Finding 12, R. 64). The agreement so reached was embodied in a contract which was dated June 10, 1940 (the date of the acceptance). The material portions of that contract are found on pages 64 and 65 of the record and speak for themselves. The agreement was clearly an undertaking of McComas and Mayes and was not an undertaking of the corporation. As such it was binding upon McComas and Mayes and if they had breached it by failing in any way or for any reason to acquire good title to the properties and to make the subsequent conveyance to Tri-County, they could have been held liable for such breach.[10] In the

[10]Several events could have transpired which would have made the carrying out of this contract difficult or impossible. Public utilities in Kentucky are subject to the jurisdiction of the Kentucky Public Service Commission, and a public utility corporation may not dissolve or sell its properties, or transfer its certificates of convenience and necessity, or issue stock, or make long-term capital loans, without application to

event of such a breach, McComas and Mayes would not have been permitted to escape liability because of impossibility of performing the contract.

In *Consolidated Realty Co.* v. *Richmond Hotel & Building Co.*, 253 Ky. 463, 69 S. W. 2d 985, the parties contracted that each would cause certain lands to be dedicated to public use so that a desired street might be opened. One of the parties carried out the contract by making the agreed dedication. The other parties failed to do so and, upon being sued for breach of the contract, attempted to defend on the ground that they did not own the land involved, and could not acquire it. The following is quoted from the opinion of the highest Court of Kentucky:

> "Neither the bond nor the contract expressly discloses the parties thereto were the owners of the Collins or Irvine properties at the time of their execution and delivery. This fact in no wise affected their validity. It was not essential to the validity of either that the respective parties at the time of the execution of same were the owners of the land they respectively thereby agreed to dedicate to the city for street purposes. Schmidt v. Martin, 199 Ky. 782, 251 S. W. 999. If either of the parties to the contract and the bond at the time of their execution had no title, nor color of title, to the land they thereby agreed to dedicate to the city, this fact did not constitute a physical

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and approval by that Commission. Hearings are held, interested communities are notified, and it by no means follows as a matter of course that such approval will be obtained. Difficulties could also have arisen in the event of the death or incapacity of stockholders, for in that event the necessary cooperation would have been under the control of executors or committees which might or might not have agreed that the plan was desirable.

impossibility of the performance of their promise, since it was competent for either party to acquire title afterwards and render themselves able to dedicate a perfect title to the city for street purposes at the time fixed by the contract." (Citing cases.)

In the American Law Institute's Restatement of the Law, subject "Contracts," Vol. 2, Sec. 455, the law is stated thus:

> "Impossibility of performing a promise that is not due to the nature of the performance but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract."

In the text following the above statement of the law examples are cited. The one most clearly on all fours with the situation we are considering is example (6), which is stated as follows:

> "A contracts with B to obtain A's father's consent to the lease of certain premises to B. A's father, because of unreasonable displeasure with A's conduct, refuses to have any discussion with A concerning the matter. A's duty is not discharged."

We submit that the written contract was the only agreement made, that it was clearly made with the stockholders, McComas and Mayes, and that it was real and binding in every respect with accompanying and resulting liabilities.

THIRD POINT: Taxpayers Have the Right To Conduct Themselves In Any Lawful Manner and the Fact That Their Sole Motive In Choosing One Lawful Course Or Another Is To Minimize Their Tax Liabilities Is Immaterial. It Is Not Even Relevant.

Where the actions of a taxpayer are lawful and free from fraud, sham or subterfuge, the fact that his motive in choosing a particular course of conduct is solely because that course gives rise to a smaller tax liability than any other, is wholly immaterial and has no bearing whatever upon a decision as to the taxability of that course of conduct. This principle of law has been reaffirmed so often that it should be unnecessary to dwell upon it at length or to cite a welter of authorities.

The leading case and the one most often quoted is that of this Court in the case of *U. S.* v. *Isham*, 17 Wall. 496. The taxpayer adopted a method of doing business to avoid tax liability, and the Government contended that it was simply a device and constituted a fraud upon the revenue. This Court said:

> "This may be true, and if not true in fact in this case it may well be true in other instances. To this objection there is an answer:
>
> "That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate: The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than $20. A careful individual, having the amount of $20 to pay, pays the same by handing to his creditor two

checks of $10 each. He thus draws checks in payment of his debt to the amount of $20, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the Government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment and thus to avoid the tax."

In *Gregory* v. *Helvering*, 293 U. S. 465, in speaking of a different type of factual situation, this Court said:

> "It is quite true that if a reorganization in reality was effected within the meaning of Subdivision B,[11] the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." (Citing other authorities.)

The Government in its brief (p. 23) states that it subscribes to this principle "wholeheartedly" but we have never yet encountered a state of facts in a tax controversy where the Government has been willing to admit that the principle is applicable. We submit that it is clearly applicable to this case.

[11]Here reference is made to Subdivision (B) of Section 112(i) of the Revenue Act of 1928, exempting gains in corporate reorganizations.

FOURTH POINT: *Commissioner v. Court Holding Co.*, 324 U. S. 331, Is Not Controlling. In That Case the Corporation Clearly Made the Sale and Thereafter Employed A Device In An Attempt To Avoid the Tax Liability Which Had Already Accrued.

In the *Court Holding Co.* case it is shown as a fact that the negotiations were between the corporation and the prospective purchasers. As a result of those negotiations, an oral agreement was reached as to the terms and conditions of sale and the parties then met to reduce the agreement to writing.

It is our view that when the agreement was so reached between the corporation and the purchasers, a tax liability accrued to the corporation providing only that the sale was made and not abandoned. The agreement to sell (if subsequently carried out) was the event which gave rise to the tax liability and no devious courses or devices or pretenses thereafter could transfer that tax liability or alter its nature. The Tax Court found that despite the appearance of a liquidating dividend, followed by a conveyance by the stockholders, the corporation had not abandoned the sales negotiations. The sale which was completed was the same sale which the corporation had negotiated and agreed upon and it was obviously the corporation's sale which was carried out. This is conclusively shown by the fact that prior to the emergence of the tax factor, the corporation accepted a down-payment of $1,000 from the purchasers. If this down-payment had been returned to the purchasers, it might at least have

been some evidence of the genuineness of the corporation's claimed abandonment of the sale. However, the down-payment was not returned but was kept by the corporation and even allowed as a credit upon the contractual purchase price when the transaction was consummated.

This Court reversed the Court of Appeals and affirmed the conclusion of the Tax Court that the sale was made by the corporation so that any gain was taxable to it. Once it was concluded that the sale was made by the corporation, the corporation was established as the source of the transfer and the purchasers were established as the end point of the transfer. No procedure could subsequently have been adopted to change the tax liability arising from this transaction and when the stockholders attempted to use the liquidating dividend and their conveyance as a means of carrying out the contract, they became, as this Court said, "a conduit through which to pass the title."

In our case the stockholders were not conduits through which the title was passed by the corporation to the purchaser in order to carry out a corporate contract, but were themselves principals in the only contract of sale which was ever agreed upon. The stockholders were taxable entities separate and distinct from their corporation. They did not act for the corporation or bind the corporation or purport to bind the corporation. The offer that was made to the corporation was flatly rejected. The offer that was accepted was clearly the offer of the stockholders and

it was so understood by Tri-County, for the agreement which was signed by Tri-County is unambiguous in this respect.

It is submitted that the *Court Holding Co.* case does not control the vitally different factual situation presented by the record here.

THE AUTHORITIES RELIED UPON BY THE GOVERNMENT ARE ANALYZED AND SHOWN TO BE INAPPLICABLE.

In addition to *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, which we have discussed above in a separate heading, the government relies upon a number of other cases, some of which are plainly distinguishable on the facts, and some of which are so far afield both in factual situations and in principles of law involved that the reason for citing them is baffling to us. We will discuss them in numbered paragraphs.

(1) *Kaufmann* v. *Commissioner*, 175 F. 2d 28.

This case was somewhat similar to our case in general pattern; but upon consideration of all of the surrounding facts and circumstances, the Tax Court there found as a fact that the sale was made by the corporation, followed by a "conduit" transfer to the purchaser through the stockholders, as in the *Court Holding Co.* case. The evidence in that case gave reasonable support to such decision. There the president of the corporation was neither a stockholder nor a director of the corporation. He negotiated with the purchaser and an agreement for the sale of the corporation's

property was reached. The contract of sale was signed by the president of the corporation purporting to act as attorney in fact for the stockholders; but the president, who was not himself a stockholder, did not testify in the case and the record was, therefore, bare on the question as to whether the negotiations and sale agreement were the result of his efforts on behalf of the corporation or on behalf of the stockholders. In the absence of any showing that he had been constituted agent and attorney in fact for the stockholders during the time when the transactions was negotiated and agreed upon, the Court not unreasonably concluded that he must have been acting for the corporation and as president of the corporation, for this was the only capacity he had at that time as far as the record showed.

The difference between this case and our case is that Mr. McComas obviously represented the stockholders rather than the corporation in all that took place between the Murfreesboro meeting of April 16, 1940, and the time of the offer to the corporation on May 15, 1940, because during that period he made no offer to sell anything but the outstanding capital stock which belonged to the stockholders and could not have been sold by the corporation.

(2) *Wichita Terminal El. Co.* v. *Commissioner*, 162 F. 2d 513.

In this case, also, the Tax Court heard the evidence, and, after considering the surrounding circumstances as prescribed in the *Court Holding Co.* case,

found that the sale was made on behalf of the corporation rather than on behalf of the stockholders. Significantly, the persons who conducted the negotiations (the president of the selling corporation and the president of the purchasing corporation) did not testify before the Tax Court; and the record was, therefore, void of any evidence as to what they intended to do and for whom the president of the selling corporation was negotiating. Without such testimony, the Tax Court was obliged to decide the case on the circumstantial evidence alone.

These circumstances do not exist in our case. In our case there was testimony of the persons who represented both the selling interests and the purchasing interests, accompanied by documentary evidence in the form of letters and contracts which clearly disclose the nature of the negotiations, the parties who participated therein, the agreement reached, and the nature of the agreement. The Court of Claims, after a hearing, has found that the evidence shows negotiations by the stockholders for themselves through one of their number; a refusal by the corporation to accept an offer which it ultimately received as a result of the stockholders' negotiations; a new offer on behalf of the stockholders under a new, lawful plan which was the equivalent in result to that which they had previously attempted to negotiate; and an acceptance by the purchaser of this second offer from the stockholders.

(3) *Guinness* v. *United States*, 73 F. Supp. 119, certiorari denied, 334 U. S. 819.

Properly regarded, the three opinions written by various judges of the Court of Claims in the *Guinness* case are not authority for anything. The Court of Claims is composed of five judges, and the statute[12] provides that "the concurrence of three judges shall be necessary to the decision of any case." The chief judge of the Court was ill at the time and did not participate. Of the four remaining judges only two concurred in the first opinion. A second opinion was written by another judge, who agreed with the *result only*, based upon facts which the other judges did not consider material. A third opinion was written by another judge, who flatly dissented. Accordingly the *result* (failure of the taxpayer to recover a judgment) was supported by the concurrence of three judges as required, but none of the opinions was supported by such required concurrence, which means that they are not the opinions of the Court of Claims.

There also the facts were materially different. The case was confused and complicated by the circumstance that the property sold (165,000 shares of the stock of Standard Power & Light Corporation) was divided into one block of 15,000 shares which was sold by the negotiators as admitted agents of the corporation, and another block of 150,000 shares which was purportedly sold on behalf of the stockholders of the selling corporation in anticipation of the receipt thereof as a

[12]U. S. C. A., Title 28, Section 243.

liquidating dividend. The denial of certiorari was simply a refusal of this Court to review the case and we have no means of knowing what might have been the reason for such refusal. Certiorari could have been denied because this Court was of the opinion that the factor which only Judge Whitaker considered important was controlling, in which event the *result* was correct. On the other hand, certiorari could have been denied because this Court was of the opinion that under the circumstances shown by the evidence and after considering all of the factors, the sale was actually made by the corporation. Or, and more likely, certiorari was denied simply because no important principle of law was involved.

It should be noted that the Court of Claims itself, which decided the *Guinness* case, found no difficulty in distinguishing it from the instant case.

(4) *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. 2d 321, certiorari denied 329 U. S. 774.

This case involved two corporations instead of one. A ship was owned by Fairfield Steamship Company, all of whose capital stock was in turn owned by Atlantic Coast Shipping Company. Atlantic caused a dissolution of Fairfield and received the ship as a dividend in kind as an incident of the liquidation of Fairfield. Atlantic then sold the ship. The decision turned not upon the factual situation, but upon the construction of an Internal Revenue Code provision which is not involved in the instant case. The Court of Appeals for the Second Circuit held that the intent of

the applicable Code provision did not encompass the sequence of events.

The following is quoted from the opinion to illustrate what the Court thought of the factual situation and the conclusion to be drawn therefrom had the said point of law not been considered controlling:

> "* * * Thus, so far as the transaction depended upon the actual intent of the only parties who could have any intent, it is impossible to find support in the record for a finding that the Fairfield Company made the sale; and if that was the legal result of what they did, it was imposed upon the transaction in spite of their intent. The case is further complicated by the fact that the majority relied for their decision upon an interpretation of Commissioner v. Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981, to which we cannot agree. On the contrary we think that the minority were right in believing that that case turned upon the fact that all the preliminary negotiations had been made expressly with the corporation; and that it was only after the bargain had been struck, that the device of a liquidation was brought in as *deus ex machina*. The contrary was true here."

(5) *Griffiths* v. *Commissioner*, 308 U. S. 355.

This is not the same type of case at all. In 1926, the taxpayer bought corporate stock for $100,000. In 1931, he realized that he had made a bad bargain and took a loss of $92,500 which was claimed for tax purposes and which was recognized by the Commissioner as a deductible loss for that year. In 1932, the tax-

payer learned that he had been defrauded by the party from whom he had purchased the stock. He brought about an agreement of that person to repurchase the stock for $100,000. Since he had previously been allowed a deductible loss, such a repurchase would obviously result in a taxable gain of the same amount. In an effort to avoid this result, the taxpayer conceived the idea of forming a corporation which would reacquire the shares which he had disposed of, return them to the taxpayer for $100,000, and then distribute the $100,000 to the taxpayer in installments over a period of years. However, when the taxpayer carried out the transaction he did not even consistently follow the device which he had planned. The party who had agreed to make good the loss was never informed of the existence of the corporation which the taxpayer had created and had no dealings with that corporation. The taxpayer received the $100,000 personally and gave his personal release to the party who had defrauded him. It was only *after* this had been done that the taxpayer turned the stock over to the corporation in pursuance of his scheme. It is obvious that the taxpayer himself received the $100,000 and the gain accrued to him. He could not thereafter escape the tax liability by transferring the property to a separate and distinct taxable entity. Neither on the facts nor on the principles of law does this case have any bearing upon our case.

(6) *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609.

We cannot understand how this case can have any bearing upon the issues here involved. Minnesota Tea

Co. received approximately $426,000 which was distributed to its stockholders, pursuant to a plan of reorganization, subject to a condition that the stockholders agree to discharge debts of the corporation amounting to approximately $106,000. It was held that to the extent of the corporate debts which were discharged by the stockholders, the corporation had realized a taxable gain.

The decision in the case was obvious. The debts were the debts of the corporation. If they were assumed by the stockholders, obviously to that extent the stockholders did not receive a liquidating dividend at all. Further discussion of this case appears useless.

(7) *Gregory* v. *Helvering*, 293 U. S. 465.

This case involved entirely different facts and an entirely different principle of law. The taxpayer owned all of the stock of Corporation A which held among its assets some shares of corporate stock which could be sold at an advantageous price. If sold by Corporation A substantial taxes would have accrued. In an effort to avoid these taxes the taxpayer caused to be organized Corporation B which issued all of its capital stock to her in exchange for the transfer to B of the corporate stock which was to be sold. Thereupon Corporation B was immediately dissolved and the corporate shares in question, being its only assets, were turned over to the taxpayer as the sole stockholder. The taxpayer then claimed that a "reorganization" had taken place within the meaning of Section 112 (g) of the Revenue Act of 1928. There was no

doubt that the various steps were really taken in strict conformity with the legal requirements literally construed. However, this Court held that the organization of a corporation for no other purpose than to sign papers and then dissolve did not constitute such a "reorganization" as was contemplated by the applicable statute.

Cases of corporate reorganizations involve qualification by the taxpayer for an exemption from a tax which would otherwise accrue. The question in our case is not this, but whether a tax accrued to Cumberland Public Service Company to begin with. We do not have any question of the creation and immediate dissolution of a sham corporation, but rather have the case of a genuine corporation which had been in business for twenty years or more and which did not take any sham action whatsoever. The dissolution of a genuine business corporation is a step authorized by law and the dissolution in our case was real, final, and without sham or subterfuge.

(8) *Moline Properties* v. *Commissioner*, 319 U. S. 436.

In this case a single person owned all of the capital stock of the corporation. Title to certain property was vested in the corporation. A sale of the property was made while title was still in the corporation and while the corporation continued to exist. There was no dissolution and no claim that a liquidating dividend had been made. The stockholder reported the gain from the sale as his personal gain and argued that

the corporation should be disregarded as amounting to nothing more than a paper fiction.

Our case bears no resemblance. We not only recognize that the corporation existed, but rely upon its separate existence as a bar to the collection from it of a tax which grew out of the actions of the stockholders.

(9) *United States* v. *Joliet & Chicago R. Co.*, 315 U. S. 44.

In this case a corporation leased its properties and attempted to avoid the corporate tax by directing that the rentals be paid to the stockholders instead of to itself. The corporation did not dissolve but continued in existence for many years.

Since the properties were leased by the corporation and at a time when the properties belonged to the corporation, we do not understand how it could have been claimed in good faith that the resulting rentals were not properties of the corporation. This being the case, the stockholders could receive the rentals only by virtue of their relationship with the corporation.

Our case plainly differs. In our case the corporation was dissolved and the "umbilical cord" was definitely and finally cut in the manner provided by law.

(10) *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415.

This was another case in which a corporation parted with its property, received a consideration for it, continued its corporate existence, and sought to

have its corporate entity disregarded on the theory that it was a mere agent of a decedent's estate. The case has nothing in common with ours.

(11) *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422.

In this case National Carbide Corp. owned all of the stock of four subsidiary corporations. Each of the four subsidiaries controlled and carried on a branch or division of the over-all business of the parent. There were agreements between the parent and the subsidiaries that each subsidiary should retain 6% of its net income and pay all the rest to the parent. The contention was that the subsidiaries were mere agents serving on the equivalent of a commission basis, that the retained 6% constituted their only taxable income, and that the balance would be taxable to the parent corporation.

This Court refused to disregard the separate corporate entities and held that each must be taxed upon the gain resulting from its own receipt of income.

CONCLUSION.

The Court of Claims heard the evidence and established that the sale was made by the stockholders rather than by Cumberland Public Service Company. In our view of the matter that ended the case. The corporation had its own independent existence and was a separate entity recognized for tax purposes. It could only be taxed for a gain which it realized. It

did not realize any gain. Instead it was dissolved and the assets in question passed to the stockholders, without gain or loss to the corporation, as provided by the Treasury Regulations. The stockholders sold those assets, realized gains, and incurred tax liabilities. Those tax liabilities were reported and paid. There is no basis upon which it can be asserted that a tax liability accrued against the corporation.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

CORNELIUS W. GRAFTON,
WILSON W. WYATT,
LOUIS LUSKY,
Counsel for the Respondent.

Of Counsel:
HENRY H. MATHIS,
WYATT, GRAFTON & GRAFTON.

APPENDIX A.

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

TREASURY REGULATIONS 103, promulgated under the Internal Revenue Code:

SEC. 19.22(a)-19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

SEC. 19.22(a)-21. *Gross income of corporation in liquidation.*—When a corporation in dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts,

and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44(d) and section 19.44-5. (See further section 19.52-2.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 214

UNITED STATES OF AMERICA,
Petitioner,

v.

CUMBERLAND PUBLIC SERVICE COMPANY,
A CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF *AMICI CURIAE*

HUGH SATTERLEE,
THORPE NESBIT,
ROLLIN BROWNE,
Amici Curiae.

December, 1949.

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BRIEF OF *AMICI CURIAE*

This brief, by permission of the Court and with the written consent of counsel for both parties, is filed by the undersigned as *amici curiae*.

THE QUESTION

The only question in the case is whether the taxpayer corporation sold its transmission and distribution facilities at a profit or distributed such properties as a liquidating dividend in kind to its stockholders, who in turn sold them.

THE DECISION BELOW

The Court of Claims "upon the evidence and the report of a commissioner" made special findings of fact to the effect that the two principal stockholders of the taxpayer (who thus controlled its corporate action) refused to permit the taxpayer to sell its properties but agreed as individuals with the would-be purchaser to take steps to acquire the properties themselves and sell them to the purchaser, which they did by procuring authorization from the other stockholders, having all the stock transferred to them, placing the taxpayer in liquidation and having the properties deeded to them, after which they conveyed to the purchaser and received the purchase price.

On those evidentiary facts, the Court of Claims concluded, in its opinion, that the properties had not been sold by the taxpayer, that there never had been any intention that the taxpayer would sell the properties, but that the properties had been distributed as a liquidating dividend to the stockholders who then as individuals had made the sale.

THE SCOPE OF REVIEW IN THIS COURT

The decision of the Court of Claims is reviewable in this Court only on questions of law. The findings of the Court of Claims are not reviewable but have the finality of a special verdict. It was the function of the Court of Claims, not only to find the evidentiary facts, but to weigh them and draw inferences from them and to make therefrom the ultimate finding or conclusion as to whether or not the sale had, in fact, been made by the taxpayer. Ct. Cls. Rule 75 (b); *United States* v. *Robert Esnault-Pelterie*, 299 U. S. 201; 303 U. S. 26.

This the Court of Claims did. Its ultimate finding or conclusion is stated in its opinion rather than as a finding of fact, as perhaps it should have been. Nevertheless, the Court left no doubt as to its views of the ultimate fact and, therefore, no good purpose would be served by remanding the case for such a "finding". *United States* v. *Wells*, 283 U. S. 102, 120-1.

THE QUESTION FOR THIS COURT

In the circumstances, this Court will not reverse the judgment below unless it concludes that *as a matter of law* an ultimate finding by the Court of Claims that the taxpayer did not sell the properties could not be supported on any hypothesis. *United States* v. *Wells, supra; United States* v. *Robert Esnault-Pelterie*, 303 U. S. 26. Bearing in mind that the findings of the Court of Claims do not purport to set forth all the evidence, it follows that the only question presented in this Court is whether a corporation incurs income tax liability by declining an offer for its property and then dissolving and distributing the property in kind to its stockholders who sell to the would-be purchaser on the same terms.

THE GOVERNMENT RAISES A FALSE ISSUE

The Government, in its petition for certiorari, did not even pretend to present the issue actually involved in this case, but dragged in all sorts of extraneous matter entirely foreign to the facts as found below, in an attempt, through a strange mixture of fact and fiction liberally spiced with invective, to make this Court believe that there is involved a mere pretended or fictitious course of conduct undertaken solely to cloak the real transaction and thus avoid a proper and normal tax burden.

The Government said in its petition that a double tax on appreciation in the value of corporate assets realized on liquidation is "the normal incidence of the fact that Congress has seen fit to tax the corporation and its stockholders as separate entities", but that "it has become the fashion to attempt to avoid" this normal burden "by going through the motions" of distributing the property to the stockholders who then sell "as though they were the individual owners" (p. 8). It was charged that a liquidating distribution is used as "one of the formalisms * * * to avoid the appearance of a transaction which would be taxable to the corporation, as would plainly be true in the case of a direct sale by the corporation" (*id.*).

In its brief on the merits the Government says that the liquidating distribution "was used only as a form to cloak a sale of the corporation's property, and was a meaningless step whereby there was a circuitous routing of title to the ultimate purchaser, the stockholders acting as pure conduits" (p. 9); and that the issue is whether a corporation can escape tax "on corporate gains" by having its property "routed to the stockholders under the guise of a liquidation distribution" (p. 10).

The real issue in the case is far different. It is whether stockholders of a corporation have the legal right to liquidate the corporate venture, take title to the assets and deal with them as individual owners without thereby subjecting the corporation to tax as though it had continued to own and deal with them in the conduct of a corporate enterprise.

Having thus befogged the issue, the Government then proceeds woefully to misconstrue the decision of the Court below, saying, in its petition, that the Court had "quite erroneously, assumed that the ultimate question depends upon who appears to be the formal vendor", and that the

Court had concluded that no gain could be attributed to the taxpayer because the stockholders and officers had "purported to act in their individual capacities" (p. 9). In its brief on the merits the Government goes so far as to say (pp. 10-11) that the Court of Claims had held that "there can be a successful evasion of the corporate tax merely because a liquidation distribution, which is one in form alone and is not intended to invest the stockholders with ownership of the property, has been interjected in an attempt to obscure the fact that it is the corporation's property which has been sold".

The actual decision below was far different. It was merely that the corporation had been dissolved, the corporate venture liquidated and the stockholders had acquired the assets through a distribution in kind and had then sold them as individuals, there never having been any intention or desire that the corporation sell them.

AS TO THE "NORMAL INCIDENCE" OF DOUBLE TAXATION OF CORPORATE INCOME

The Government's entire case rests on the false assumption that double taxation of corporate income is a major desideratum of our tax law and that any arrangement of business transactions so as to avoid the extra tax is wholly reprehensible. The assumption will not bear analysis.

Originally the corporate income tax was designed merely as complementary to the personal income tax. The rate of the corporate tax was the same as the rate of the normal personal tax, from which corporate dividends were exempted. In the later desperate search for additional revenues, that notion of the proper function of the corporate tax has been abandoned, but its abandonment is scarcely anything to which we can point with pride. It is, rather,

generally recognized as one of the more serious defects in our tax system. Economic and fiscal experts of all shades of opinion have repeatedly urged relief from the oppressive and stifling burden of the double taxation of corporate income. Practically every plan advanced for tax reform following the Second World War has made such relief one of its prime recommendations.[1] It is highly probable that such a reform has been delayed only by the pressing need for revenue and, to a lesser extent, by the difficulty of agreeing upon some form of relief administratively more practical than the British credit system.

Meanwhile, a partial defense of the present inequitable and unsound system has been that doing business in corporate form is a valuable privilege for which some additional tax burden may fairly be imposed. Another partial defense has been that the Government cannot defer its tax until corporate income is divided among the stockholders; revenue needs are too urgent and, moreover, the income might later be lost in new ventures so that the tax never would be paid. We need not determine whether those are good defenses. We need only to note that they have no application to the double taxation of capital gains incident upon the *cessation of corporate business.*

When a corporation is dissolved, the special privilege of doing business in corporate form is relinquished. Any profit which may flow from the discontinuance of the corporate enterprise inures immediately and directly to the individual stockholders from whom the appropriate tax can be collected at once.

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[1] A review of several of these recommendations and a comprehensive study of the entire problem may be found in an article entitled "Integrating Federal Income Taxes on Corporations and Their Shareholders", by Professor Othel D. Westfall, in Taxes (The Tax Magazine) for March, 1949, at page 236.

Finally, in the instant case (and in most such cases) the profit in question is not ordinary income but is capital gain. Other countries get along quite well without taxing such gains at all; there can be no special pride in taxing them twice.

Congress evidently has recognized the considerations just mentioned and has been careful in all our tax laws to give the owners of corporate business an option to avoid the burden of the double tax upon the abandonment and liquidation of the corporate venture.

The statute and regulations will be fully set forth in the briefs filed by the parties herein, and it is unnecessary to prolong this brief by an analysis of them. The Government hints, without directly stating, that the scheme of the statute and regulations permitting the avoidance of the corporate tax on liquidation was intended to apply only where the stockholders intend to retain the corporate property, and presumably continue to operate the corporate venture, indefinitely, but that it was not intended to apply where the sole purpose of the stockholders was the immediate liquidation of the corporate business by a sale of the property. That, indeed, would be a curious interpretation to place upon the Congressional intent. It simply defies all reason and logic to assume that Congress would extend an opportunity for relief from double taxation in cases where the corporate business is continued in unincorporated form, but to deny such relief where the business enterprise is entirely abandoned.

But, the Government suggests, the "gain" or appreciation in the corporate assets "accrued" to the corporation and, therefore, belonged to it as of right. The answer is that such is not always the case. The appreciation may have occurred before the property was acquired by the

corporation and even while it was owned by the very same individuals who, as stockholders, received it on liquidation. A quite common situation would be as follows: A group of individuals start business as a partnership, acquiring a plant at a cost of, say, $50,000; later, when the plant is worth $100,000, the business is incorporated, the partners receiving stock in exchange for the property; then later, when the plant is still worth $100,000, the corporation is dissolved and the business liquidated. In such a case, if the corporation should sell the property and distribute the proceeds to the stockholders, there would be a double tax (corporate and individual) on the single profit of $50,000, every dollar of which would have accrued to and been realized only by the individuals. If, on the other hand, the stockholders should take the property out of the corporation and sell it as individuals, thus realizing and paying tax on their own profit, could it be said that their action was in any way reprehensible or that they had "evaded" or even "avoided" a "normal incidence" of taxation which Congress intended they should bear?

For all that appears in this record, the situation just described may actually have existed in this case.

It is true that in many similar situations, because of the number of stockholders, the nature of the property or the corporate indebtedness, or some combination of one or more of those factors, the property cannot be distributed to the stockholders but must be sold by and for account of the corporation. In such cases, of course, the corporate tax must be paid under existing law, and the imposition of the corporate tax in such a situation may possibly be justified because of the fact that the use of the corporate form was actually required in order to make the sale. But if the stockholders can and do actually take over the property and

sell it as individuals, there should be no special effort at casuistry to disregard what they did simply because if they had not been able to do it or had not actually done it, the extra tax would have been incurred.

Perhaps, if the transaction is not clear-cut so that doubt remains as to precisely what was done, the courts are justified in resolving the doubt against the taxpayers since they had it in their power to leave a clear, unambiguous record. But there is strong feeling in various quarters that some courts have leaned over too far in imputing sales to corporations in liquidation. See, for example, *Court Holding Company* v. *Commissioner*, 2 T. C. 531, rev'd. 143 F. (2d) 823, rev'd. 324 U. S. 331; *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. (2d) 321, cer. den. 329 U. S. 774. At any rate, those decisions focused attention sharply on the problem, as a result of which a strong demand has arisen for an amendment of the law to provide that such a gain shall not be taxed to the corporation even where it admittedly makes the sale and distributes the cash proceeds among the stockholders. This demand has not gone entirely unheeded in the halls of Congress.

In the Revenue Revision Bill of 1948 (H. R. 6712), which passed the House in June, 1948, but was not reached in the Senate before adjournment, just such a provision was included as Section 129. The House Committee on Ways and Means in its report accompanying the bill[2] pointed out that a double tax was incurred on liquidation if the corporation sold and distributed the proceeds, whereas only one tax was incurred if the property was distributed and the sale made by the stockholders. The Committee then said:

> "The two methods of liquidation are essentially the same, and your committee believes there is no

[2] House Report No. 2087, 80th Congress, 2nd Session, p. 15.

justification for subjecting the second method to discriminatory tax treatment, particularly since this method represents, in most cases, the more efficient form of liquidation."

H. R. 6712 and the accompanying report throw some light on the attitude of Congress toward the problem involved in this case. The action taken by the House presages prompt Congressional repudiation of any adoption of the Government's philosophy as to the "normal incidence" of the double tax on corporate liquidations.

CONCLUSION

From the inception of our income tax law it has been the rule that a corporation in liquidation may distribute its property to its stockholders who may sell and divide the proceeds among themselves without incurring the burden of double taxation which normally falls on corporate income. The Court of Claims held that that is precisely what occurred in this case. This Court will not review the finding of the Court of Claims as to what actually occurred and, therefore, the judgment below should be affirmed.

Respectfully submitted,

HUGH SATTERLEE,
THORPE NESBIT,
ROLLIN BROWNE,
Amici Curiae.

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